85-1146

No. .....

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
# Supreme Court of the United States
October Term, 1985

—o—

PATRICIA KWALLEK,

*Petitioner,*

vs.

STATE OF ALASKA,

*Respondent.*

—o—

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

—o—

DANIEL WESTERBURG
BIRCH, HORTON, BITTNER,
PESTINGER AND ANDERSON
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550

*Attorneys for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

## QUESTIONS PRESENTED FOR REVIEW

A murder suspect is questioned by State troopers after receiving *Miranda* warnings. She initially agrees to answer questions after being assured that she can terminate the interview at any time. After several minutes of questioning, additional troopers arrive and the suspect is served with a number of search warrants, per a pre-conceived plan by the troopers to pressure the suspect into confessing. The suspect then states: "No, I think I should wait and talk with my mom [when she] gets here before I say what to do."

The suspect's request is ignored and the troopers continue their questioning until the suspect states for a second time: "I will talk when my mom gets here, she can help." Again the request is ignored and the questioning continues until the suspect states for a third time: "I just, [when] mom gets here we'll talk about it."

Over the suspect's objections, a transcript of the interview is presented to the jury at trial. The following issues are presented here for review:

(1) Did the suspect invoke her right to remain silent, guaranteed under the Fifth Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment?

(2) Should portions of the statement have been suppressed under *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Doyle v. Ohio*, 426 U.S. 610 (1976)?

(3) Was the trial court's refusal to suppress any of the statement harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967)?

## TABLE OF CONTENTS


Pages

Questions Presented for Review ..... 1

Table of Contents ..... ii

Table of Authorities ..... iii

Opinions Below ..... 1

Jurisdictional Statement ..... 2

Constitutional Provisions, Statutes and Rules of Court Involved ..... 2

Statement of the Case:

A. Factual Background ..... 4

B. Procedural History/How the Federal Issue Was Raised ..... 7

1. Before the Trial Court ..... 7

2. Before the Court of Appeals ..... 8

3. Before the Alaska Supreme Court ..... 10

Why Review Should Be Granted:

A. Mrs. Kwallek Clearly Invoked Her Fifth Amendment Rights ..... 11

B. The June 25th Statement Should Have Been Suppressed Under *Miranda v. Arizona* and *Doyle v. Ohio* ..... 14

C. The Error Was Not Harmless Beyond a Reasonable Doubt ..... 17

D. Importance of the Question ..... 21

Conclusion ..... 22

TABLE OF CONTENTS—Continued

Pages

Appendices:

*Kwallek v. State*, MOJ #883, July 24, 1985—Appendix A ..... App. 1

August 16, 1985 Order Denying Petition for Rehearing—Appendix B ..... App. 37

November 1, 1985 Order Denying Petition for Hearing—Appendix C [entered on November 4, 1985] ..... App. 39

June 14, 1983 Judgment of the Superior Court—Appendix D ..... App. 41

June 25, 1982 Interview Transcript—Appendix E ..... App. 43

## TABLE OF AUTHORITIES

Pages

CASES:

*Burch v. Louisiana*, 441 U.S. 130 (1979) ..... 15

*Chapman v. California*, 386 U.S. 18 (1967) ..... 8, 17, 20

*Doyle v. Ohio*, 426 U.S. 610 (1976) ..... 8, 10, 11, 14, 15, 16, 17, 19, 20, 21

*Eddings v. Oklahoma*, 455 U.S. 104 (1982) ..... 15

*Fare v. Michael C.*, 442 U.S. 707 (1979) ..... 13

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... 5, 8, 10, 13, 14, 15, 17, 19, 20, 21

*People v. Burton*, 491 P.2d 793 (Cal. 1971) ..... 13

*Smith v. Illinois*, — U.S. —, 83 L.Ed.2d 488, 105 S.Ct. 490 (1984) ..... 12

*State v. Kaeka*, 653 P.2d 96 (Haw. App. 1982) ..... 13

*Street v. New York*, 394 U.S. 576 (1969) ..... 14

*United States v. Greer*, 772 F.2d 293 (7th Cir. 1985) ..... 20

*United States v. Haro-Portillo*, 531 F.2d 962 (9th Cir. 1976) ..... 9, 15, 16, 17

*United States v. Lewis*, 651 F.2d 1163 (6th Cir. 1981) ..... 17, 20

*United States v. Williams*, 556 F.2d 65 (D.C. Cir. 1977), *cert. den.*, 431 U.S. 972 (1977) ..... 9, 15, 16, 17

*United States v. Wycoff*, 545 F.2d 679 (9th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977) ..... 15

*United States v. Valencia*, 773 F.2d 1037 (9th Cir. 1985) ..... 15, 20

## TABLE OF AUTHORITIES—Continued

Pages

CONSTITUTIONAL PROVISIONS:

Fifth Amendment ..... 2, 10, 11, 12, 13, 14, 15, 21

Fourteenth Amendment ..... 3

STATUTES:

AS 11.41.100 ..... 3, 7

RULES OF COURT:

Alaska Rule of Criminal Procedure 47(b) ..... 3, 9, 14

No. .....

—o—

In The

# Supreme Court of the United States

October Term, 1985

—o—

PATRICIA KWALLEK,

*Petitioner,*

vs.

STATE OF ALASKA,

*Respondent.*

—o—

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

—o—

## OPINIONS BELOW

The MEMORANDUM OPINION AND JUDGMENT of the Alaska Court of Appeals, affirming Patricia Kwallek's conviction for first-degree murder, was issued on July 24, 1985. The OPINION has not been officially reported and is reproduced at Appendix "A". The Alaska

Court of Appeals' ORDER denying Mrs. Kwallek's PETITION FOR REHEARING was entered on August 16, 1985. The ORDER was not officially reported and is reproduced at Appendix "B". The Alaska Supreme Court's ORDER denying Mrs. Kwallek's PETITION FOR HEARING was entered on November 4, 1985. The ORDER has not been officially reported. It is reproduced at Appendix "C".

———o———

## JURISDICTIONAL STATEMENT

The judgment of the trial court was entered against Mrs. Kwallek on June 14, 1983. (Appendix "D".) A timely appeal was perfected to the Alaska Court of Appeals which affirmed the conviction on July 24, 1985. Mrs. Kwallek's PETITION FOR REHEARING was denied on August 16, 1985. A PETITION FOR HEARING was timely filed with the Alaska Supreme Court and was denied without opinion on November 4, 1985.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

———o———

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

### United States Constitution

*Fifth Amendment:* No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising

in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Fourteenth Amendment, Section 1:* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Alaska Statutes

*Alaska Statute 11.41.100. Murder in the First Degree.* (a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, he

1) causes the death of any person; or

2) compels or induces any person to commit suicide through duress or deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

## Rules of Court

*Rule 47(b) of the Alaska Rules of Criminal Procedure: Plain error.* Plain errors or defects affecting sub-

stantial rights may be noticed although they were not brought to the attention of the court.

———o———

## STATEMENT OF THE CASE

### A. Factual Background.

In December of 1982, Patricia Kwallek, then a 44-year-old housewife residing in Ketchikan, Alaska, was convicted of the first-degree murder of her husband, Bernard. Mr. Kwallek was shot and killed in the front yard of the family residence in June of that year.

There were no witnesses to the shooting. The prosecution attempted to show that on the morning of June 24, 1982, the Kwalleks argued over finances and Mrs. Kwallek shot her hsuband with a .22 caliber rifle as he walked from the residence towards his Ford pickup truck. The prosecution's theory was based entirely upon circumstantial evidence.

Mrs. Kwallek consistently denied any involvement in her hsuband's death. The defense argued at trial that an unknown male assailant shot and killed Mr. Kwallek during the midst of a heated argument. Neighborhood witnesses testified they overhead two males arguing in the front yard of the Kwallek residence at the time of the shooting. The identity of the second male with whom Mr. Kwallek was arguing still remains unknown.

The day after Mr. Kwallek's death, Mrs. Kwallek was interviewed by two State troopers assigned to the case, Sgts. Lown and Glass. A copy of the interview transcript is attached as Appendix "E".

The interview commenced with Sgt. Glass informing Mrs. Kwallek that she was not under arrest. Glass then told Mrs. Kwallek that he did not believe she had been telling the "true story" of what had happened on the morning of the shooting. Mrs. Kwallek responded: "I'll try to help any way I can" and then proceeded to explain her recollection of what had transpired on the morning of June 24th. (Appendix "E" at 43.)

Approximately eight minutes after the interview began, Sgt. Lown temporarily discontinued questioning in order to give Mrs. Kwallek her *Miranda* warnings and asked her to sign a standard waiver form. At this point, the following exchange took place:

Q. [By Lown]: What I'm going to ask you to do Patsy, is for us to continue talking to you we would like you to sign this particular statement indicating that you understand it and that you're willing to continue to talk to us. Do you understand that?

A. [By Mrs. Kwallek]: Can I still stop then if I want to?

Q. Certainly, that's what it says.

A. Anytime I want to.

Q. Yes, that what, that's what the waiver says.

A. Okay.

[Appendix "E" at 50.]

Mrs. Kwallek then signed the waiver form. After several minutes of additional questioning, Sgt. Glass served Mrs. Kwallek with several search warrants for her bathrobe, a sample of attic insulation and bank and bookkeeping records at the residence. Sgt. Glass then brought

in several investigators from Anchorage to conduct the search. The search warrants and additional troopers were part of a pre-conceived plan by Sgt. Lown to apply additional pressure to Mrs. Kwallek to confess. (*See* Appendix "A" at 33.)

Upon receiving her copies of the search warrants, Mrs. Kwallek stated: "I think I should wait and talk with my mom [when she] gets here before I say what to do." (Appendix "E" at 57.)

Ignoring Mrs. Kwallek's remark, Sgts. Lown and Glass continued to question Mrs. Kwallek in a more aggressive fashion, focusing on family financial problems—the purported motive for the murder. (Appendix "E" at 57-60.) Mrs. Kwallek then repeated: "I will talk when my mom gets here, she can help." (Appendix "E" at 60.)

Again ignoring Mrs. Kwallek's remark, Sgt. Glass continued to question Mrs. Kwallek on family finances until she stated for a third time: "I don't know, I just, [when] mom gets here we'll talk about it." (Appendix "E" at 60-61.)

The interview was then terminated and Mrs. Kwallek was taken to the Ketchikan trooper headquarters. Mrs. Kwallek maintained her innocence throughout the interview. Nevertheless, she did make several incriminating admissions, including reference to her inability to pay family bills "because the money was gone"; the fact that she was keeping the family's financial troubles hidden from her husband; and the recognition that if her husband had discovered the family's financial problems he might have

insisted that he and she "go their separate ways." (Appendix "E" at 43-61.)

Mrs. Kwallek was formally arrested by Sgt. Glass on suspicion of first-degree murder shortly after she was taken to trooper headquarters.

## B. Procedural History/How the Federal Issue Was Raised.

### 1. Before the Trial Court.

Mrs. Kwallek was indicted for first-degree murder. (AS 11.41.100.) Prior to trial, she moved to suppress the statement she had given to Sgts. Lown and Glass on June 25, 1982. Specifically, she requested that the court suppress "that portion of the statement given after the defendant indicated she wanted to break off the interview." The argument was based upon *Miranda v. Arizona*, 384 U.S. 436 (1966).

The argument was repeated by counsel at a hearing on the motion: "And so, as far as we're concerned, even if the court finds that the *Miranda* warning wasn't required, any testimony, or any statement given after that first indication by Mrs. Kwallek that she wanted to discontinue the interview, or at least she wanted to talk with her mother, and Sgt. Lown got the impression she wanted to discontinue the interview, that portion should be stricken." (Tr. 142-143.)

The court denied the motion to suppress. Despite uncontradicted testimony to the contrary at a pre-trial hearing, the court ruled that Mrs. Kwallek had not unequivocally invoked her right to remain silent. It also ruled that the interview transcript was not sufficiently incriminating to warrant a suppression order. (Appendix "A" at 23-27.)

Mrs. Kwallek repeated her objections to the interview transcript when it was offered by the State as an exhibit at trial. The defendant's objections were noted and overruled. (Tr. 327.)

**2. Before the Court of Appeals.**

At pages 96-113 of her opening brief to the Alaska Court of Appeals and at pages 53-59 of her reply brief, Mrs. Kwallek repeated her argument that her *Miranda* rights had been violated and that her motion to suppress the statement should have been granted. She also argued the statement constituted an impermissible comment on her right to remain silent under *Doyle v. Ohio*, 426 U.S. 610 (1976).

The Alaska Court of Appeals ruled that Mrs. Kwallek's first statement ("No I think I should wait and talk with my mom [when she] gets here before I say what to do") was not an unequivocal assertion of her Fifth Amendment rights but that her second statement ("I will talk when my mom gets here, she can help.") was sufficiently clear to constitute an assertion. The court agreed that all dialogue after the second request should have been suppressed. (Appendix "A" at 23-25.)

However, the court determined that this portion of the transcript contained no inculpatory material. As a result, any error in presenting the statement to the jury was harmless beyond a reasonable doubt, under *Chapman v. California*, 386 U.S. 18 (1967).

The Court of Appeals determined that Mrs. Kwallek had not raised the *Doyle v. Ohio* "impermissible comment on exercise of *Miranda* rights" issue before the trial court. Nevertheless, the court considered the merits of the argu-

ment under Alaska's "plain error" rule, Alaska Rule of Criminal Procedure 47(b).

The court determined, on the merits, that the State was permitted to submit evidence showing that Mrs. Kwallek wanted to talk with her mother before making further statements. According to the court, the evidence was permissible in order "to provide the jury with an explanation for the abrupt termination of the interview, which would otherwise have been inexplicable." (Appendix "A" at 26.) The court relied upon *United States v. Williams*, 556 F.2d 65 (D.C. Cir. 1977), *cert. den.*, 431 U.S. 972 (1977) and *United States v. Haro-Portillo*, 531 F.2d 962 (9th Cir. 1976).

The court also considered the evidence admissible for another reason:

> Indeed, although Kwallek's two subsequent requests amounted to an invocation of the right to silence, those requests, when considered literally, did not constitute refusals to speak. Rather, they were requests to delay further questioning for a short period of time: until Kwallek's mother arrived. [Appendix "A" at 26.]

The court concluded that there was no "realistic likelihood that the jury placed appreciable weight on the challenged statements as evidence of Kwallek's consciousness of guilt" and that any error in presenting the transcript to the jury was not "obviously prejudicial" to Mrs. Kwallek. (Appendix "A" at 26-27.)

Chief Judge Bryner dissented from the majority's holding. He concluded that Mrs. Kwallek's first request to stop the interrogation constituted an unequivocal assertion of her right to remain silent.

Chief Judge Bryner also disagreed with the majority's conclusion that admission of the statement constituted harmless error:

> Upon reviewing that portion of Kwallek's interview that occurred after she initially asked to wait for her mother, I cannot say that admission of these unlawfully obtained statements was harmless beyond a reasonable doubt. It may well be true that much of the substantive information stated by Kwallek in this portion of the interview was cumulative. If this were all there was to it, a harmless error finding might be tenable.
>
> *Yet far more damaging to Kwallek than anything she said was what she did not say. The admission into evidence of the illegally obtained portions of Kwallek's interview disclosed to the jury two separate instances in which Kwallek, when pressed for potentially incriminating details, ceased being cooperative and asserted her right to silence.* The unmistakable and in all likelihood indelible impression created by this evidence is that Kwallek had something to hide—that her refusal to speak was motivated by the consciousness of her own guilt. [Appendix "A" at 34-35; fn. omitted; emphasis added.]

At pages 1-4 of her PETITION FOR REHEARING filed with the Court of Appeals, Mrs. Kwallek repeated her arguments that the State's use of the June 25th statement was contrary to *Doyle* and *Miranda*. The PETITION was summarily denied.

### 3. Before the Alaska Supreme Court.

On September 3, 1985 Mrs. Kwallek filed a PETITION FOR HEARING with the Alaska Supreme Court. At pages 3-9 of the PETITION, and at pages 8-11 of her reply memorandum, Mrs. Kwallek repeated her argu-

ments that her Fifth Amendment rights under *Doyle* and *Miranda* had been violated by the State's use of the interview transcript at trial. The PETITION was denied without opinion in an Order entered on November 4, 1985. The ORDER was issued over the dissents of Chief Justice Rabinowitz and Justice Moore who would have granted the PETITION "as to the issue of failure to break off questioning when requested to do so." (Appendix "C".)

———o———

## WHY REVIEW SHOULD BE GRANTED

### A. Mrs. Kwallek Clearly Invoked Her Fifth Amendment Rights.

The Court of Appeals—over Chief Judge Bryner's dissent—concluded that Mrs. Kwallek's first request to break off the interview was ambiguous and not an unequivocal assertion of her right to remain silent.

The court was mistaken. Any ambiguity present on the face of the interview transcript was clarified by Sgt. Lown's testimony at the pre-trial evidentiary hearing. He admitted at the hearing that he fully understood Mrs. Kwallek's statement about talking with her mother—made at the time the other troopers entered the premises with search warrants—to be a request to terminate the interview. Note the following exchange between Lown and defense counsel at the hearing:

> Q: [By Mr. Westerburg]: Now, at some point Mrs. Kwallek, during the interview, indicated that she didn't want to talk anymore, is that correct?

A: [By Sgt. Lown]: Yes.

Q: At what point did she first make that indication?

A: She stated she did not want to talk until after she had talked to her mother.

Q: Alright, and was that around the time when the other troopers were coming in to execute the warrants?

A: I believe it was.

Q: Did you and Sgt. Glass then continue to ask her questions after that point?

A: I believe she was asked a few questions, yes.

Q: Isn't it normal practice that when the subject requests that no more questions be asked . . . or [indicates] that she doesn't want to talk anymore, that the officers are supposed to discontinue questioning?

A: Yes?

Q: But you nevertheless, you and Sgt. Glass, continued to ask questions after that point?

A: We asked her some general qeustions, yes.

Q: And did she, subsequent to that first—after she first made an indication she didn't want to talk anymore, or she wanted to discontinue the questioning, did she repeat it at a later time?

A: I think she said it several times.

Q: Alright and you and Sgt. Glass, nevertheless, continued to ask her some questions?

A: General questions. [E.H. Tr. 75-76.]

An invocation of constitutional rights does not have to take any particular form. *See e.g. Smith v. Illinois*, — U.S. —, 83 L.Ed.2d 488, 105 S. Ct. 490 (1984). Informing an investigator of a desire to break off questioning pending advice from another is a classic exercise of Fifth Amend-

ment rights. *See e.g.* syllabus no. 1 in *State v. Kaeka*, 653 P.2d 96 (Haw. App. 1982):

> When an accused adult is advised of her *Miranda* rights and then asked by police, "would you like to tell me what happened?", and answers "no, I'd like to talk to my father first," she is invoking her right to remain silent, not her right to counsel. [*Id.* at 97.]

*See also People v. Burton*, 491 P.2d 793 (Cal. 1971) (request by juvenile to speak with parent constituting invocation of Fifth Amendment rights). *Cf. Fare v. Michael C.*, 442 U.S. 707 (1979) (ambiguous request by juvenile to see probation officer not a *per se* invocation of Fifth Amendment rights).

Sgt. Lown's perception that Mrs. Kwallek's first request to talk with her mother was an attempt to break off the interview is consistent with the context in which the request was made.

As noted by Chief Judge Bryner in his dissent, when Mrs. Kwallek was given her *Miranda* warnings, she specifically asked whether she could terminate the questioning any time after signing the *Miranda* waiver form. The troopers assured her that she could. "The police were thus realistically on notice that Kwallek was contemplating the possibility of asserting her right to silence, despite her apparent willingness at that stage to give initial waiver and proceed with the interview." (Appendix "A" at 33.)

In any event, the troopers made no attempt to clarify Mrs. Kwallek's statement. They proceeded as if no request had been made. Indeed, from Sgt. Lown's perspective, there was no need for clarification. He knew that Mrs. Kwallek had requested to terminate the interview.

In light of the interview transcript itself, the circumstances surrounding the interview and Sgt. Lown's concessions, the Court of Appeals erred in concluding that Mrs. Kwallek's first request to terminate the interview was not an invocation of her right to remain silent.

**B. The June 25th Statement Should Have Been Suppressed in Part Under Miranda v. Arizona and Doyle v. Ohio.**

The Court of Appeals agreed that Mrs. Kwallek's second request to terminate the interview constituted an unequivocal assertion of her Fifth Amendment rights. It held that "all statements Kwallek made after that point should properly have been suppressed." (Appendix "A" at 25.) The court apparently based its reasoning on *Miranda v. Arizona*, 384 U.S. 436 (1966). This court in *Miranda* held in part that State authorities may not use statements of an accused taken after the accused's *Miranda* rights had been violated. *Id.* at 468, fn. 37; 479.

Mrs. Kwallek had also argued to the Court of Appeals that the State's use of the interview transcript constituted an impermissible comment on her right to remain silent under *Doyle v. Ohio*, 426 U.S. 610 (1976).

Since the *Doyle* argument had not been specifically presented to the trial court, the Court of Appeals considered the merits of the argument under Alaska's plain error rule, Criminal Rule 47(b).

Whether a petitioner has properly preserved a federal issue in the State courts is a question of federal, not State law. *Street v. New York*, 394 U.S. 576, 583 (1969). In order to preserve a federal issue for later review by this court, it is only necessary that the general argument

be preserved. Citations to particular cases is not necessary. The court's jurisdiction "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 fn. 9 (1982).

Mrs. Kwallek submits that the *Doyle* argument was properly preserved in the state courts. *Doyle* is largely a restatement of the following proposition recognized in *Miranda:*

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.* [384 U.S. at 468, fn. 37; emphasis added.]

Both *Miranda* and *Doyle* are based on Fifth Amendment considerations. Courts often consider both *Miranda* and *Doyle* under a single claim that a defendant's Fifth Amendment rights were violated. *See e.g., United States v. Wycoff*, 545 F.2d 679 (9th Cir. 1976). (Discussing *Miranda* and *Doyle* interchangeably); *United States v. Valencia*, 773 F.2d 1037 (9th Cir. 1985) (same). By moving to suppress a portion of the statement under *Miranda*, Mrs. Kwallek preserved any arguments she had under *Doyle*. Accordingly, the *Doyle* issue is properly before the court.

In any event, since the Court of Appeals proceeded to decide the merits of the *Doyle* claim, this court can review the issue even if it were not properly preserved at the trial level. *Burch v. Louisiana*, 441 U.S. 130, 133 fn. 5 (1979).

Citing *United States v. Williams*, 556 F.2d 85 (D.C. Cir. 1977) and *United States v. Haro-Portillo*, 531 F.2d 962

(9th Cir. 1976), the Court of Appeals concluded that no *Doyle* violation occurred. The court was wrong.

In *Williams*, an investigating officer testified at trial that the defendant told him he wanted to talk to a lawyer before answerir [illegible]sonal questions. The court determined that the [illegible] did not warrant a mistrial.

In *Haro-Portillo*, the Ninth Circuit held it not improper for the government to introduce evidence that the defendant invoked his right to remain silent, where the evidence was used to explain to the jury the context in which the interview was terminated.

Neither *Williams* nor *Haro-Portillo* should be followed. The prejudice to a defendant caused by multiple references to his or her exercise of constitutional rights greatly outweighs the need to explain to the jury why an interview terminated.

Further, in the present case, Mrs. Kwallek first invoked her right to silence in the middle of the interview, not the end. Accordingly, reference to the invocation was not necessary to demonstrate how the interview "concluded." Furthermore, in a case such as this, where the defendant was forced to repeat her request to break off questioning several times before it was honored, the State should not be permitted to exploit its misconduct by making references to these multiple requests at trial. As Chief Judge Bryner noted in his dissent:

> Surely, however, admitting evidence of Kwallek's two subsequent requests to wait for her mother could not be justified on this theory. Having heard Kwallek end the interview once, the jury had little legitimate need to hear her end it again and again. [Appendix "A" at 35.]

Finally, adopting the *Williams/Haro-Portillo* rule will mean that *in virtually every case where a defendant exercises* his right to remain silent during the course of an interview, the State can make reference to it at trial since almost invariably, the interview will conclude at that point.

The court rejected the *Doyle* argument for the additional reason that "although Kwallek's two subsequent requests amounted to an invocation of the right to silence, those requests, when considered literally, did not constitute refusals to speak." (Appendix "A" at 26.) The two conclusions are mutually inconsistent. If Mrs. Kwallek invoked her right to silence under *Miranda*—as the court conceded she did—then she "literally" refused to speak under *Doyle*. She continued talking only because the troopers ignored her many requests to break off the interview. Demonstrating to a jury that a suspect made repeated attempts to exercise *Miranda* rights presents a classic *Doyle* violation. *See e.g., United States v. Lewis*, 651 F.2d 1163 (6th Cir. 1981) (*Doyle* violation recognized where IRS agent testified about the defendant's three refusals to answer questions and two requests for counsel).

### C. The Error Was Not Harmless Beyond a Reasonable Doubt.

The Court of Appeals determined that Mrs. Kwallek "said very little, either inculpatory or exculpatory, after the second mention of her desire to wait for her mother's arrival." (Appendix "A" at 25.) The court concluded that admission of Mrs. Kwallek's statements made in the latter part of her interview was therefore harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967).

Mrs. Kwallek disagrees with the court's conclusion. The court inexplicably ignored the inculpatory nature of the invocations themselves and the context in which they were made. The post-invocation of rights portion of the transcript includes the troopers' confronting Mrs. Kwallek with the physical evidence found at the scene, pointed questions by the troopers regarding Mr. Kwallek's reaction upon losing a boat stall because of an unpaid bill and dialogue regarding Mrs. Kwallek's inability to pay off family creditors. Particularly relevant are the following excerpts:

> Q [By Lown]: We've also checked other people in town . . . the building company . . . the people that hauled in the gravel out here, for your shop that he was building, none of those bills were paid.
>
> A [By Mrs. Kwallek]: Not yet they haven't been.
>
> Q: Why hadn't those bills been paid?
>
> A: (inaudible) At this point there is no money to pay for them.
>
> Q: Now [Mr. Kwallek] was . . . a very, very punctual person about paying his bills. I mean he prided himself on paying his bills all the time. He prided himself on being current and never being behind . . .
>
> A: Um hum (yes).
>
> * * *
>
> Q: . . . and all of a sudden he wakes up and finds himself, people aren't delivering supplies that he wants unless he pays cash. Now apparently it appears that he thought all these bills were paid. Is there any reason why he would think these were paid and they weren't?
>
> A: Because I hadn't told him anything.
>
> [Appendix "E" at 58-59.]

* * *

Q: So he would know if there was money to pay the bills, is that correct?

A: (Pause) um hum (yes).

Q: It is correct? So he assumed the bills were paid, he would know if there was money present or not, so he would have to assume that there was money enough to pay the bills.

A: Uh uh (no).

Q: *There wasn't enough money to pay the bills?*

A: *(No verbal response.)*

Q: *How come?*

A: *There just wasn't 'cause it was gone.*

Q: *What happened to it?*

A: *I will talk when my mom gets here, she can help.*

[Appendix "E" 59-60; emphasis added.]

* * *

Q [By Sgt. Glass]: Uh, your background Patsy and your training has been in bookkeeping. Is that correct?

I: Uh hum (yes).

Q: *Do you keep any kind of books at all? On the money spent out?*

A: *Uh uh (no). No.*

Q: [*How*] *come that is?*

A: *I don't know, I just, mom gets here we'll talk about it.*

[Appendix "E" 61; emphasis added.]

This court recognized in *Miranda* and *Doyle* the unfairness and prejudice to a defendant where the jury is presented with evidence that he invoked his right to re-

main silent after receiving *Miranda* warnings. *Miranda*, 348 U.S. at 468, fn. 37; *Doyle*, 426 U.S. at 618. Mrs. Kwallek urges the court to find that where a jury has been presented with such evidence, contrary to *Miranda* and *Doyle*, the error can rarely be harmless beyond a reasonable doubt under *Chapman*, especially in a case like this where the evidence of guilt was not overwhelming. *See e.g., United States v. Lewis*, 651 F.2d at 1169 (*Doyle* violation not harmless in close case); *United States v. Valencia*, 773 F.2d at 1042 ("thus, testimony concerning the defendant's invocation of *Miranda* rights is not probative, although it is potentially highly prejudicial."); and *United States v. Greer*, 772 F.2d 293, 297 (7th Cir. 1985) (in order for a *Doyle* violation to be harmless, the prosecution's case against the defendant must be "overwhelming.").

The State's prosecution of Mrs. Kwallek was based entirely upon circumstantial evidence. Mrs. Kwallek consistently denied any involvement in her husband's death. Unrebutted evidence established that the Kwalleks were having no marital problems prior to the shooting. Disinterested neighbors heard two men arguing in the front yard of the Kwallek residence immediately before the shooting.

Since there were no eye witnesses, the defense rested largely upon the credibility of Mrs. Kwallek, a Ketchikan housewife with no prior involvement in the criminal justice system. That credibility was irreparably damaged when the State presented evidence that she repeatedly refused to cooperate with State troopers during a critical point in their investigation.

The error was not harmless beyond a reasonable doubt under *Chapman*. The Court of Appeals should have reversed the conviction.

**D. Importance of the Question.**

The Court of Appeals' decision conflicts with both *Miranda v. Arizona* and *Doyle v. Ohio* and should be reviewed and reversed on that basis alone.

Further, acceptance of the petition will give this court an opportunity to consider several novel issues:

1. Where a police officer concedes under oath that he knew a suspect invoked her right to remain silent, may the court ignore the testimony and conclude that the invocation was ambiguous?

2. May the State introduce evidence at trial that a defendant invoked her Fifth Amendment rights, in order to demonstrate to the jury the context in which the interview concluded?

3. Where a suspect has invoked her right to remain silent under *Miranda*, can a court properly conclude that there was no invocation under *Doyle*?

4. Where a defendant has moved to suppress a statement as taken contrary to *Miranda*, has she preserved for later federal review related arguments under *Doyle*?

Insofar as Mrs. Kwallek is aware, these issues have never been squarely faced by this court. Since they are likely to arise in other cases, the court should take this opportunity to issue a definitive ruling on each.

———o———

## CONCLUSION

For all of these reasons, Mrs. Kwallek respectfully requests that her PETITION FOR WRIT OF CERTIORARI be granted.

DATED this 26th day of December, 1985, at Anchorage, Alaska.

Respectfully submitted,

DANIEL WESTERBURG
BIRCH, HORTON, BITTNER,
PESTINGER AND ANDERSON
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550

*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A

THE COURT OF APPEALS OF THE STATE OF ALASKA

File No. A-31

PATRICIA KWALLEK,

*Appellant,*

v.

STATE OF ALASKA,

*Appellee.*

MEMORANDUM OPINION AND JUDGMENT*

[No. 883—July 24, 1985]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Thomas E. Schulz, Judge.

Appearances: Daniel Westerburg, Birch, Horton, Bittner, Pestinger and Anderson, Anchorage, for Appellant. Cynthia M. Hora, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

PER CURIAM.
SINGLETON: Judge, concurring.
BRYNER, Chief Judge, dissenting.

Patricia Kwallek was convicted, following a jury trial, of the first-degree murder of her hsuband, Bernard

---

*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

Kwallek, Superior Court Judge Thomas E. Schulz sentenced Kwallek to thirty years' imprisonment. On appeal Kwallek challenges her conviction on numerous grounds. She also contends that the sentence imposed by Judge Schulz is excessive. We affirm.

## DESTRUCTION OF EVIDENCE

Kwallek first alleges that the failure of police investigators to gather and preserve certain items of potentially exculpatory evidence deprived her of her constitutional right to due process.[1]

### A. *Gunshot Residue Test*

Initially, Kwallek urges that she was deprived of potentially exculpatory evidence because Alaska State Troopers failed to take gunshot residue swabs from her hands for testing purposes until more than twelve hours after the shooting. Kwallek alleges that gunshot residue

---

1. United States Const. amend. V; Alaska Const. art. I, § 7. Based on the same police conduct, Kwallek also argues that she was deprived of her rights to compulsory process, confrontation, and effective assistance of counsel (United States Const. amend. VI, Alaska Const. art. 1, § 11), as well as her right to fair treatment during an executive branch investigation (Alaska Const. art. I, § 7). Finally, Kwallek argues that the state's failure to gather and preserve evidence violated her right to pretrial discovery under Alaska Criminal Rule 16. Kwallek has not sought to show how the protections afforded to her under these provisions would exceed in scope the protection accorded her by the due process clause of the United States or Alaska Constitutions. Accordingly, our holding on Kwallek's due process claim is also dispositive of the similar claims she predicates on alternative legal bases.

sampling should have been completed within six hours of the shooting.[2]

After a hearing, Judge Schulz found that Kwallek was not initially a suspect in the murder, and, indeed, that investigators did not have evidence to implicate her until about five and one-half hours after the shooting. The judge also found that the results of a timely gunshot residue analysis would in any event have been inconclusive. Relying on these findings, Judge Schulz decided that no due process violation had occurred. Although he agreed with Kwallek that the troopers should have acted more promptly to obtain swabs once she became a suspect, Judge Schulz declined to consider dismissal as an appropriate sanction. Rather, the judge expressly instructed the jury to view with caution all other gunshot residue evidence presented at trial.[3]

---

2. After the state obtained swabs from Kwallek's hands, it sent them for gunshot residue testing to the F.B.I. laboratory. However, they were not tested. The F.B.I. laboratory informed the prosecution that it would not analyze for gunshot residue because the "excessive period of time" between the time of the shooting and the time of the swabbing "precludes the possibility of a meaningful examination." There is nothing in the record to indicate that Kwallek sought to have independent tests performed on the swabs by a private laboratory or that all laboratories would have been likely to concur with the F.B.I. and refuse to perform an analysis.

3. The robe worn by Kwallek when her husband was shot was seized by the troopers on the day after the shooting and was tested for gunshot residue. This testing yielded results consistent with the theory that Kwallek had fired the murder weapon. The results were submitted to the jury and their significance was the subject of testimony by several witnesses, both prosecution and defense. The instruction given by the court with respect to gunshot residue testing stated:

(Continued on following page)

It is well settled that due process of law is violated when the state fails to preserve material evidence of an exculpatory nature. Evidence is deemed material when it "might have led the jury to entertain a reasonable doubt about the defendant's guilt." *Williams v. State*, 629 P.2d 54, 64 (Alaska 1981). *See also California v. Trombetta*, — U.S. —, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984); *Maloney v. State*, 667 P.2d 1258 (Alaska App. 1983). The duty to preserve evidence at the scene of a crime arises only when the potentially exculpatory nature of the evidence is reasonably apparent. *See Nicholson v. State*, 570 P.2d 1058, 1064 (Alaska 1977); *Hatfield v. State*, 663 P.2d 987, 990-91 (Alaska App. 1983). *See also California v. Trombetta*, — U.S. —, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984).

Kwallek, focusing on Judge Schulz's finding that a negative gunshot residue test would not have conclusively established innocence, argues that the judge applied an incorrect standard, since the question should properly be whether the evidence might have created a reasonable doubt, not whether it would have conclusively ruled out guilt. We need not decide Kwallek's argument, for we conclude that the potential materiality of taking gunshot residue swabs from Kwallek's hands did not become reasonably apparent to the troopers until they developed evidence linking Kwallek to the commission of the offense.

As Judge Schulz correctly determined, police suspicion focused on Kwallek for the first time approximately

---

(Continued from previous page)

In this case there was no timely gunshot residue test on the hands of the defendant. Because the failure to perform that test may have deprived the defendant of evidence in her favor, you are hereby instructed to view all gunshot residue evidence in this case with caution.

five and one-half hours after her husband had been shot. This left only one-half hour within which the troopers could conceivably have acted without exceeding the six-hour period now proposed by Kwallek as the limit for reasonable police conduct in taking a gunshot residue swab. When investigating officers developed the evidence that initially directed suspicion toward Kwallek, Kwallek was not in police custody, nor was she even in their presence. The due process clause requires reasonableness and fairness, not perfection. *See, e.g., Anchorage v. Flack*, 685 P.2d 108, 109 (Alaska App. 1984). Considering the nature, scope and progress of the investigation, we cannot say that the troopers, once they became aware of evidence linking Kwallek to the crime, were subjected to a constitutional duty to react instantly by assuring preservation of a gunshot residue swab within the next half hour.[4]

---

4. There is no suggestion here of purposeful delay and nothing to indicate that the investigating officers were actually aware, or that they should have been on notice, that the F.B.I. laboratory would decline to analyze gunshot residue swabs taken twelve hours after a shooting. Evidence in the record concerning the issue suggests that, while the reliability of testing declines steadily with time, useful results may in some cases be obtained even though the elapsed time considerably exceeds six hours.

We reject Kwallek's related contention that the troopers had a due process duty to take a gunshot residue swab from Kwallek's hand before she became a suspect. Police do have an obligation to preserve and disclose potentially exculpatory evidence, and there are many instances when preservation of evidence may be required even in the absence of a specific suspect. In such cases, the potentially exculpatory nature of the evidence and its relevance to the offense will, as a rule, be reasonably apparent regardless of who the ultimate suspect might turn out to be. *See*, e.g., People v. Nation, 604 P.2d 1051 (Cal. 1980). However, when,

(Continued on following page)

B. *Bloody Palm Print*

Police photographed but did not attempt to lift or otherwise preserve a bloody palm print at the scene of the shooting. The palm print was on the fender of the Kwalleks' pickup truck near the spot where Bernard Kwallek's body was found. Bernard Kwallek had been shot five times in the head, neck, and chest. Investigating officers apparently assumed the palm print had been made by the victim.

At the close of the prosecution's case-in-chief, Kwallek moved for dismissal, raising for the first time the state's failure to preserve the palm print. Judge Schulz found that the evidence would not have been very probative and denied the motion.

Because the state's failure to preserve the palm print was first raised after the commencement of trial, our determination of this issue is governed by a stricter standard of materiality than would apply had a timely pretrial motion to dismiss been made. Where the issue of the state's failure to preserve exculpatory evidence is raised for the first time at trial the accused normally must bear the burden of establishing not that the evidence might have led to a reasonable doubt, but that the evidence would in fact have been exculpatory and that it would actually

---

(Continued from previous page)

as here, the relevance of evidence is inextricably tied to a particular person's status as a suspect in the crime, no duty to preserve can realistically be said to arise until that person has been or reasonably should have been identified as a suspect. Absent a reasonable indication that Kwallek was implicated in the murder of her husband, police owed her no due process duty to conduct tests simply on the off-chance that she might later become implicated.

have created a reasonable doubt. *See Maloney v. State*, 667 P.2d 1258, 1266 and n.9 (Alaska App. 1983). *See also United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).[5]

Applying this standard,[6] we conclude that Kwallek has failed to meet her burden of establishing the materiality of the palm print. From the testimony of the investigating troopers, there is considerable doubt that the print would have yielded an impression capable of being used for purposes of comparison. Moreover, at the time the crime scene was being investigated, it appeared highly likely that the print was left on the pickup truck by the

---

5. Kwallek urges that this court not to apply the *Maloney/Agurs* standard of materiality to this case because *Maloney* was not yet decided when this case was tried. However, our holding in *Maloney* did not create a new rule of law or depart from established precedent. Rather, it applied a rule that had been settled by the United States Supreme Court's 1976 decision in *Agurs*. *See Maloney*, 667 P.2d at 1264.

6. In *Maloney*, 667 P.2d at 1265 n.7, we indicated that the question whether to apply the more stringent *Agurs* standard of materiality must be answered on a case by case basis. The record in the present case indicates that Sgt. Lown of the Alaska State Troopers testified before the grand jury about the presence of the palm print. Kwallek's counsel was given a copy of the grand jury transcript and reviewed it before the omnibus hearing. Prior to trial Kwallek was also furnished a copy of a photograph depicting the palm print. Kwallek has never denied being aware of the palm print prior to trial. On appeal, Kwallek's counsel argued that the issue of the palm print was not raised before trial because trial counsel wanted the court to have a chance to hear the state's evidence before ruling on the materiality of the destroyed evidence. This argument finds no support in the contemporaneous record of trial. No explanation was given at trial for the delay in bringing up the palm print issue. Considering the totality of the circumstances and the lack of any on-the-record showing of good cause for the delay in raising the issue, we conclude that the more stringent *Maloney/Agurs* standard of materiality must be applied here.

victim. According to Kwallek's own testimony at trial, she went to the front door of her house almost immediately after she heard shots. She saw no one in the immediate vicinity. Even assuming the presence of a usable print that had not been made by Bernard Kwallek, it appears that by the time police located the palm print a number of other persons—including Kwallek and a team of paramedics—had had access to the area and an opportunity for contact with the victim's body. It is possible that any one of them could have been responsible for the print.

Kwallek nevertheless contends that the palm print might have been that of the assailant and that the blood might have been the assailant's blood rather than her husband's. In this event, Kwallek urges, her innocence would have been firmly established had a sample of the blood been saved for testing and an impression of the palm print lifted for comparison. Yet we find nothing in the record suggesting even a remote possibility that the victim's assailant was injured in the course of the shooting or that it was the assailant's blood on the fender of the pickup truck. This theory of materiality is, we believe, entirely speculative. *See Maloney v. State*, 667 P.2d at 1266.

C. *Fingerprints On Murder Weapon*

Kwallek further claims a violation of her due process rights occurred when police failed to preserve potentially exculpatory fingerprints on the murder weapon, a .22 caliber rifle found by Alaska State Troopers in Kwallek's

attic.[7] Judge Schulz rejected this argument, concluding that there was little possibility that fingerprint evidence would have shed any significant light on the question of Kwallek's guilt or innocence.

After reviewing the record, we are inclined to agree with Judge Schulz's evaluation of the probable significance of the fingerprint evidence, even assuming preservation of usable prints could have been assured by more careful police conduct.[8] It is undisputed that the murder

---

7. It was not until after the beginning of trial that Kwallek first moved for dismissal based on the state's handling of this fingerprint evidence. The state argues on appeal that Kwallek's motion was untimely and that our holding in *Maloney* should apply to the fingerprint evidence as well as to the palm print evidence. However, it appears that logistical problems stemming chiefly from the state's delay in conducting ballistics tests on the murder weapon prevented Kwallek and her trial counsel from being apprised of details concerning the handling of the fingerprint evidence until trial had commenced. We are satisfied from our review of the record that Kwallek's delay in raising this issue is adequately explained. Accordingly, we find no basis for applying the more restrictive *Maloney/Agurs* standard of materiality.

8. The forestock and butt stock of the murder weapon were dusted for latent prints by Sgt. Lown shortly after troopers seized the gun. Dusting revealed some ridge patterns on the stocks, and Sgt. Lown lifted two prints from the butt stock. Because the lifts were of poor quality, he elected to terminate his efforts and wrapped the forestock and butt stock with fingerprint tape to preserve all remaining prints. The rifle was later shipped out of state for ballistics testing. It was returned to Ketchikan shortly before trial. By this time Kwallek had obained a court order requiring fingerprints from the weapon to be examined within forty-eight hours of its arrival in Ketchikan. Sgt. Glass lifted all prints from the forestock and butt stock and sent the lifts to Juneau for examination by Leif Arnold Lind, a trooper fingerprint expert. At trial, Lind testified, *inter alia*, that none of the lifts from the weapon were of sufficiently good quality to permit comparison with Kwallek's prints.

weapon was owned by the Kwalleks and had frequently been fired by Kwallek personally. Thus it would not have been surprising or particularly incriminating to find her fingerprints on the weapon. By the same token, because the gun had been in the Kwalleks' possession for a considerable time and had apparently been used frequently at places such as the local rifle range, it would hardly have been surprising to find the fingerprints of third persons on it. Kwallek has not argued that the murder weapon was inaccessible to other persons prior to the murder. She has not demonstrated why it would be logical to suppose that any third-party fingerprints on the weapon would more likely have been placed there by her husband's assailant than by some other person who had previously handled the gun. Finally, Kwallek has not suggested the existence of any reliable method to distinguish between older and newer third-party fingerprints, so that it might have been possible to make an accurate determination as to whether any third-party prints on the weapon were those of a prior user or of the purported assailant.[9]

---

9. *Compare* White v. State, 577 P.2d 1056 (Alaska 1978) (failure to preserve a lamp bearing the palm print of the accused did not violate due process even though position of the print might have corroborated defendant's version of the incident, since the print would have been of marginal materiality), and Adkinson v. State, 611 P.2d 528, 534 (Alaska 1980) (negligent destruction of fingerprint evidence on barrel of murder weapon did not violate due process although prints were purportedly those of victim, because they would not necessarily have been exculpatory), *with* Wyrick v. State, 590 P.2d 46 (Alaska 1979) (where fingerprints lifted from items stolen in burglary were apparently the only usable prints on the items and the lifts were preserved and disclosed to the accused, failure to preserve stolen items for additional testing did not violate due process; a different situation would exist if evidence showed use of improper lifting techniques).

Ultimately, however, we need not rest our decision exclusively on the marginal relevance of the potential fingerprint evidence. Our review of the record further convinces us that Kwallek has failed to demonstrate that the investigating troopers in this case ever actually destroyed any usable fingerprint evidence—whether exculpatory or inculpatory.

In arguing that evidence was destroyed, Kwallek relies heavily on testimony indicating that the fingerprints on the murder weapon were lifted by troopers who were not fingerprint experts, that it is preferable and in keeping with usual trooper practice to have fingerprints lifted, where feasible, by fingerprint specialists, and that it would have been desirable for all prints to have been lifted from the murder weapon early in the investigation, before the rifle was sent away for ballistics testing. Although the testimony relied on by Kwallek certainly indicates that greater caution might have been appropriate in the handling of the fingerprints on the murder weapon, it does little to establish any actual loss us usable fingerprints. There has been no showing that Troopers Lown or Glass, despite their lack of expertise, were not sufficiently trained or experienced to know how to lift usable fingerprints from wooden surfaces like those of the rifle. Nor has there been any suggestion as to precisely what the troopers did or failed to do that might have resulted in the loss of usable prints. In effect, Kwallek's argument assumes that the absence of any usable fingerprints on the weapon should be attributed to mishandling by the Alaska State Troopers. The assumption is both speculative and, with reference to the particular evidence developed before the superior court in this case, unsupported.

Testimony presented below established that fingerprints of identifiable quality are only rarely found on wooden surfaces like the forestock and butt stock of the murder weapon. In addition, both troopers who had attempted to obtain usable prints from the weapon testified that, when dusted, the fingerprints on the weapon appeared to be of poor quality.[10] Indeed, Sgt. Glass, who lifted all but the initial two fingerprints from the murder weapon, candidly acknowledged that he was not a fingerprint expert, yet he described the result of his lifts as "the best available," because "[i]t wasn't a good print to start with." Similarly, the record is devoid of any evidence to support a finding that the delay in lifting fingerprints from the weapon was in fact causally related to the troopers' subsequent inability to obtain usable prints.

---

10. Addressing his initial efforts to lift fingerprints from the butt stock of the rifle, Sgt. Lown testified at one point that he "attempted a couple of fingerprint latent lifts [from the butt stock], . . . they didn't come out that well, and I didn't want to chance ruining any more of them, so I simply covered the rest of [the rifle] with fingerprint tape to preserve whatever was on there." Kwallek seizes on Lown's reference to "ruining" more prints as an admission that the first two lifts he attempted were improperly done. Given the context of Lown's entire testimony, however, Kwallek's characterization of the testimony seems inaccurate. It appears that Lown's statement was not meant as an admission that he had done anything in particular incorrectly in performing the first two lifts; rather, the statement merely recognized that the process of lifting a print inevitably destroys the latent print, thus precluding subsequent attempts by other persons. The testimony obviously indicates Lown's awareness, after attempting to lift two prints, that it would be preferable to take the precaution of having further lifts attempted by someone with more expertise, who might be able to obtain a better result. This is, however, far from tantamount to an admission that the lifts Lown attempted were carelessly or otherwise improperly performed; nor do we read it as equivalent to an admission that usable prints had in fact been destroyed.

We conclude that the evidence does not permit a finding of any significant possibility that usable fingerprint evidence was actually destroyed by the troopers' handling of the murder weapon. Accordingly, we rule that Judge Schulz did not commit error in determining that Kwallek's right to due process of law was not violated by the failure of investigating officers to preserve potentially exculpatory evidence.[11]

## DISMISSAL OF INDICTMENT

Prior to trial Kwallek moved to dismiss her indictment, alleging that the grand jury was not properly instructed on the standard of proof required to return an indictment. The superior court had informed the grand jury at the beginning of its term that:

> Your duty . . . is to determine whether the evidence is such as would, if unexplained or uncontradicted, warrant a conviction by the trial jury, and leave the determination of guilt, or innocence, to that body.

---

11. Kwallek has additionally argued that the cumulative effect of the troopers' conduct amounted to a violation of due process. She relies in part on two decisions from other jurisdictions: State v. Wright, 557 P.2d 1 (Wash. 1976); and Crockett v. State, 603 P.2d 1078 (Nev. 1979). While the issue presented in this case is in our view a close one, we find the cases relied on by Kwallek to be distinguishable. These cases are similar to the present case in that all involve destruction of or failure to preserve a number of different items associated with the crime scene. Neither *Crockett* nor *Wright*, however, actually found a violation of due process on cumulative grounds after expressly finding that the failure to preserve individual items did not constitute an independent basis for a due process volation. In the present case, we have determined that the separate challenges raised by Kwallek did not individually involve a violation of her right to due process. Considering the record as a whole, we decline to find a violation of due process based upon cumulative effect.

This instruction, which tracked the substance of Criminal Rule 6(q), was repeated to the grand jury by the prosecutor who presented Kwallek's indictment.

Kwallek argues on appeal, as she did below, that the grand jury should have been told expressly that the evidence would be insufficient to warrant a conviction by the trial jury unless it supported a finding of guilt beyond a reasonable doubt. We reject Kwallek's argument.

Here, the applicable standard, as specified in Criminal Rule 6(q), was properly given to the grand jury. In the absence of an indication of confusion by the grand jury as to the meaning of that standard or of some case-specific need for clarification, we decline to hold that any additional explanation of Criminal Rule 6(q) is required. *See Coleman v. State*, 553 P.2d 40, 48 (Alaska 1976). *See also Adams v. State*, 598 P.2d 503, 510 n.11 (Alaska 1979); *Oxereok v. State*, 611 P.2d 913, 917 (Alaska 1980).

Kwallek further argues that dismissal of her indictment was warranted because the prosecution failed to present exculpatory evidence to the grand jury. She relies on a portion of an interview given by a friend, Mary Ann White, to Trooper Bullington. In her statement, White arguably said that she had spoken with Kwallek by telephone shortly before Bernard Kwallek was shot and that, at that time, Kwallek had invited her (White) to visit later that morning.

Kwallek argues that White's statement would have given rise to an inference that Kwallek was acting normally and was not in the midst of a dispute with her husband immediately prior to his death. We note, however,

that both the phrasing of White's statement to Bullington and the subsequent changes by White in her own account of the incident make it extremely difficult to determine whether White actually meant to indicate that she had spoken with Kwallek on the morning of the shooting or on the prior evening.

In any event, this evidence is not "substantially favorable," so as to require its presentation to the grand jury. *See Tookak v. State*, 648 P.2d 1018, 1021 (Alaska App. 1982). Rather, it falls squarely within the scope of *Frink v. State*, 597 P.2d 154, 166 (Alaska 1979), where the supreme court stated:

> But the prosecutor's obligation to present exculpatory evidence to the grand jury does not turn the prosecutor into a defense attorney; the prosecutor does not have to develop evidence for the defendant and present every lead possibly favorable to the defendant.

*See also Preston v. State*, 615 P.2d 594, 602 (Alaska 1980). We find no violation of the prosecutor's duty to present exculpatory evidence to the grand jury.

Kwallek's final claim against the validity of the indictment is that the evidence was insufficient. Kwallek reasons that the evidence presented against her to the grand jury was entirely circumstantial and failed to establish a *prima facie* case. We disagree. Considered in its totality the evidence, though circumstantial, would, if unexplained and uncontradicted, warrant a conviction at trial. Alaska R. Crim. P. 6(q). We therefore hold that the superior court did not err in denying Kwallek's motions to dismiss the indictment.

## SEARCH AND SEIZURE

Prior to trial Kwallek filed motions to suppress various items of evidence on grounds of illegal search and seizure. The motions were denied by Judge Schulz following a hearing. Kwallek renews her claims on appeal.

First, Kwallek questions the voluntariness of the consent she gave for the search of her residence following the murder. However, there was conflicting evidence presented below on Kwallek's mental and emotional state at the time of her consent. We hold that Judge Schulz's finding that Kwallek's consent was voluntary is supported by substantial evidence and is not clearly erroneous. *Hubert v. State*, 638 P.2d 677, 682 n.4 (Alaska App. 1981). *See also Phillips v. State*, 625 P.2d 816 (Alaska 1980).

Second, Kwallek alleges that the contents of her purse were improperly admitted at trial because the purse was illegally seized from a friend with whom Kallek had left it. Kwallek's argument presents a close question. *Compare Gieffels v. State*, 590 P.2d 55 (Alaska 1979), and *Ingram v. State*, — P.2d —, Op. No. 489 (Alaska App., July 19, 1985), *with Gebert v. State*, 454 P.2d 897, 900 (Nevada 1969), and *State v. Schad*, 633 P.2d 366, 372 (Ariz. 1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). It is not necessary for us to resolve this issue, however, since admission of the contents of Kwallek's purse, if error, was clearly harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). Evidence from the purse was cumulative, consisting only of documents relating to the Kwalleks' poor financial condition. A large number of similar papers were seized from Kwallek's residence and

admitted into evidence. The Kwalleks' deteriorating financial condition was also documented by numerous other records, as well as by the testimony of various witnesses and by Kwallek's own admissons.

## SUPPRESSION OF KWALLEK'S JUNE 25 STATEMENT

Kwallek spent the night after her husband's murder at the house of a friend. The next day she agreed to return home to be interviewed by the Alaska State Troopers. A trooper gave her a ride to her home. At the outset of the interview Sgt. Lown told Kwallek that she was not in custody and asked if she understood that she was free to leave at any time. Kwallek said she understood. Sergeants Lown and Glass interviewed Kwallek for approximately twenty-six minutes; the interview was recorded. Approximately eight minutes into the interview Lown advised Kwallek of her *Miranda*[12] rights. Kwallek asked whether, if she waived her rights, she would still be free to stop the questioning at any time. After being assured that she was still free to terminate the questioning, Kwallek executed a written waiver of her *Miranda* rights and continued with the interview.

Shortly before completion of Kwallek's interview, two additional troopers, by prearrangement, entered Kwallek's residence and served Kwallek with copies of two search warrants, explaining that one was for financial records and the other for the robe Kwallek had worn at the time of the shooting. Sgt. Lown asked Kwallek if she

---

12. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

had any questions about the search. Kwallek replied: "I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sergeants Lown and Glass continued to interview Kwallek, however, pressing for information about why she had not paid recent bills. Kwallek answered a number of questions and then indicated again that she wanted to wait until her mother arrived. The troopers acknowledged Kwallek's request but persisted in asking some additional questions about Kwallek's banking records. Though Kwallek responded to several additional questions, she soon stated for a third time that she wanted to wait for her mother. Sgt. Glass formally terminated the interview in response to Kwallek's third request.[13]

---

13. From the point when Kwallek first indicated she wanted to wait until her mother arrived until Sgt. Glass terminated questioning, the interview went as follows:

Q. [Lown]: You are, you have now been served with copies of each of these search warrants. We're going to have the troopers outside, who are investigators from Anchorage, come in and conduct this search. Do you have any questions about that?

A: No. I think I should wait and talk with my mom [when she] gets here before I say what to do.

Q [Lown]: Okay.

Q [Lown]: Was Spade [Bernard Kwallek] upset yesterday, Patsy, when he left for work?

A: No, he said good morning, joked ah, his back's been feeling good because of the sun. Bothering was his ankle and his toe, he, he's got bad ankles, and they, he turns them and they hurt. And his toe gets sorta swollen and his ankle when he takes his shoes off.

(Continued on following page)

During the entire interview, Kwallek made no confession or direct admission of guilt. She did, however,

---

(Continued from previous page)

Q [Lown]: Do you remember what happened yesterday morning?

A: Ah, the same thing that happens every single morning, he [pause] . . .

Q [Glass]: Wasn't yesterday morning a little different, Patsy?

A: No. Other than what happened, it wasn't any different between Spader and I.

Q [Glass]: Well Patsy we found the rifle in the attic.

A: Oh, no reason for a rifle to be in the attic.

Q [Lown]: We found the bullets in the rifle that matched the ammunition in the reloading room. We recovered a bullet from the body of your husband that matches the bullets in the rifle . . .

A: Uhum [yes].

Q [Lown]: . . . we recovered the casings from the spent cartridges right outside your front door.

A: Uhum [yes]. I didn't see anyone outside the front door.

Q [Lown]: Patsy, there was something more going on than what's you're telling us about. Your husband, and we've heard this from several people, was not just a little bit mad, about losing his boat slip, he was extremely mad about it. He was extremely mad because the bill hadn't been paid, because something you were supposed to do, you had not carried through with.

A: That's right but he said that when they took the, the deposit and then covered it, and then the stall should still be ours.

Q [Lown]: Well checking the records with the a, boat harbor people, indicated that the bill was not paid.

A: Well, that's what they say but yet . . .

(Continued on following page)

acknowledge the existence of financial problems and state that those problems had affected her relationship with her

---

(Continued from previous page)

Q [Lown]: We've also checked other people in town, ah, the building company, ah, the people that hauled in the gravel out here, for your shop that he was building, none of those bills were paid.

A: Not yet they haven't been.

Q [Lown]: Why hadn't those bills been paid?

A: [Inaudible] at this point there's no money to pay for them.

Q [Lown]: Now Spade was ah, who everybody we've talked to was a very, very punctual person about paying his bills, I mean he prided himself on paying his bills all the time. He prided on being current and never being behind . . .

A: Uhum [yes].

Q [Lown]: . . . times on bill . . .

A: Uhum [yes].

Q [Lown]: . . . and all of a sudden he wakes up and finds himself, people aren't delivering supplies that he wants unless he pays cash. Now apparently it appears that he thought all these bills were paid. Is there any reason why he would think these were paid and they weren't?

A: Because I hadn't told him anything.

Q [Lown]: Well, uh he's the one who provides the income, is, isn't that correct?

A: Uhum [yes].

Q [Lown]: And a, he knows how much money he makes doesn't he?

A: Uhum [yes].

Q [Lown]: Does he receive a paycheck?

A: Uhum [yes].

Q [Lown]: So he would know if there was money to pay the bills, is that correct?

(Continued on following page)

husband. At trial, the prosecution used Kwallek's interview to bolster the state's theory that Kwallek had killed

---

(Continued from previous page)

A: [pause] uhum [yes].

Q [Lown]: Is it correct? So he assumed the bills were paid, he would know if there was money present or not, so he would have to assume that there was money enough to pay the bills.

A: Umuh [no].

Q [Lown]: There wasn't money enough to pay the bills?

A: [no verbal response]

Q [Lown]: How come?

A: There just wasn't 'cause it was gone.

Q [Lown]: What happened to it?

A: I will talk when my mom gets here, she can help.

Q [Glass]: You want to wait until your mom gets here to talk to us?

A: [inaudible; both are talking] . . . she should be here in just a little while. Chris is getting her now.

Q [Glass]: Do you want to talk to us then, Patsy when she gets here?

A: Uhum [yes]. Is it be that okay?

Q [Glass]: Sure.

Q [Lown]: Sure, that's fine.

Q: In the mean time we'll just sit here and wait, and let the other two investigators go ahead and a, maybe you can tell us where the a, bank records a, are? Do you have a checking account Patsy?

A: Umuh [no].

Q [Glass]: No checking account? How do you keep track of your a, bills?

A: Spader keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

(Continued on following page)

her husband in a disagreement over the deteriorating state of their financial affairs.

Kwallek moved prior to trial to suppress evidence of her entire June 25 statement, maintaining that she was in custody from the inception of the interview and should therefore have been given a *Miranda* warning before the interview began. In denying Kwallek's motion, Judge Schulz found that she was not in custody when the interview began. Kwallek contests this ruling. We conclude from our review of the record that Judge Schulz's finding is not clearly erroneous. There is ample evidence to support a conclusion that Kwallek could not reasonably have believed that she was in custody when questioning began. Accordingly, no *Miranda* warning was required at that time. *See Hunter v. State*, 590 P.2d 888, 892-99 (Alaska

---

(Continued from previous page)

Q [Glass]: You don't have a checking account?

A: No.

Q [Glass]: Has he ever had a checking account?

A: No.

Q [Glass]: A, you're, your background Patsy and your training has been in bookkeeping is that correct?

A: Uhum [yes].

Q [Glass]: Do you keep any kind of books at all? On the money spent out?

A: Umuh [no]. No.

Q [Glass]: How come that is?

A: I don't know I just, mom gets here we'll talk about it.

Q [Glass]: OK. At the time it is approximately 2:14 p.m. we'll go off record.

1979). *See also Quick v. State*, 599 P.2d 712, 717-18 (Alaska 1979); *Hintz v. State*, 627 P.2d 207, 209 (Alaska 1981); *Henry v. State*, 621 P.2d 1, 3 (Alaska 1980).

Kwallek moved alternatively to suppress all responses that she made after she first said she wanted to speak with her mother before answering additional questions. Kwallek argued that continued questioning beyond this point violated her right to remain silent.[14] Judge Schulz rejected this argument, finding that Kwallek was not in custody, that her initial request to wait until her mother arrived did not constitute an unequivocal assertion of her right to remain silent and that, in any event, the interview was terminated within a few minutes of Kwallek's subsequent requests to wait for her mother. Judge Schulz concluded that the questioning that followed those requests was perfunctory and produced no incriminating responses. Kwallek challenges the propriety of Judge Schulz's ruling.

It is well settled that once a person has asserted the right to remain silent all further questioning must cease.

---

14. Kwallek's argument was premised on the further contention that even if she was not in custody at the inception of the interrogation, the interrogation had become custodial in nature by this point. Kwallek reasserts this argument on appeal. She maintains that by the time she made the initial request to wait for her mother, a significant amount of time had elapsed. During this time, the interrogation had intensified and the troopers had disclosed their belief that Kwallek was a suspect and was not telling the truth. She had also been formally advised of her *Miranda* rights. Two additional uniformed troopers had entered Kwallek's home to execute search warrants, and copies of the warrants were served on Kwallek in a manner calculated to enhance the possibility of a confession. In considering the suppression issue it is assumed, without being decided, that Kwallek's argument with respect to the custodial nature of her interrogation is correct.

No particular form of words or conduct is necessary to assert the right. *Giacomazzi v. State,* 633 P.2d 218, 221 (Alaska 1981). However, it has consistently been held that, in order to be effective, assertion of the right to silence must be clear and unequivocal. *Vail v. State,* 599 P.2d 1371, 1378 (Alaska 1979); *Nashoalook v. State,* 663 P.2d 975, 978 (Alaska App. 1983).

Having examined the record, we find that Kwallek's initial request to wait until her mother arrived did not amount to an unequivocal assertion of the right to silence. Kwallek made this statement immediately after copies of two search warrants had been served on her. The statement was in direct response not to any portion of the ongoing interrogation, but rather to Sgt. Lown's specific inquiry as to whether Kwallek had any questions about the execution of the warrant. Judge Schulz did not err in finding that Sergeants Lown and Glass were not required to cease interrogation immediately in response to this statement.

In contrast Kwallek's second request was not in reference to the execution of the search warrants, but was clearly in response to interrogation. There was no ambiguity about Kwallek's desire. Her request constituted an unmistakable assertion of her right to silence.[15] As such,

---

15. Indeed, the record indicates that Sgt. Lown recognized Kwallek's statement as an assertion of her right to remain silent, but that he viewed his additional questions to be permissible because they were "general" rather than specific. The additional questions appear reasonably likely to produce incriminating responses and therefore constituted a prohibited continuation of the police interrogation.

it required immediate cessation of all further questioning. All statements Kwallek made after this point should properly have been suppressed.

The state nevertheless maintains that, even if admission of this portion of Kwallek's statement was error, the error was harmless, since Kwallek said very little, either inculpatory or exculpatory, after the second mention of her desire to wait for her mother's arrival. The state points out that the relatively few statements Kwallek did make after this point did not go beyond the substance of other statements she had already made and revealed nothing that was not already known or easily discoverable through available independent sources. A review of the record indicates that the state's position is well-taken. Admission of the statements made by Kwallek in the latter part of her interview was, under the circumstances in this case, harmless beyond a reasonable doubt. *Chapman v. Califonia*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

Kwallek separately challenges the admission of evidence relating to those portions of her June 25 statement in which she expressed her desire to stop questioning until she could speak with her mother. Kwallek argues that admission of this evidence amounted to an impermissible comment on her exercise of the right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976); *Gunnerud v. State*, 611 P.2d 69, 75-76 (Alaska 1980). Since this argument is raised for the first time on appeal, our review is limited by the plain error rule. Alaska R. Crim. P. 47(b).

In considering Kwallek's argument, we note initially that admission of evidence showing that Kwallek wanted to

talk to her mother before making further statements tended to provide the jury with an explanation for the abrupt termination of the interview, which would otherwise have been inexplicable. *Cf. United States v. Williams*, 556 F.2d 65 (D.C. Cir.), *cert. denied*, 431 U.S. 972, 97 S. Ct. 2936, 53 L.Ed.2d 1070 (1977); *United States v. Haro-Portillo*, 531 F.2d 962 (9th Cir. 1976).

Moreover, as we have already held, Kwallek's initial reference to her mother's arrival was not a clear invocation of her constitutional right and presumably the jury would not have understood it to be one. Indeed, although Kwallek's two subsequent requests amounted to an invocation of the right to silence, these requests, when considered literally, did not constitute refusals to speak. Rather, they were requests to delay further questioning for a short period of time: until Kwallek's mother arrived. Kwallek went out of her way to explain that her mother was already enroute and that any delay would therefore be minimmal. She assured the troopers of her willingness to speak after her mother arrived. Thus, we do not believe that these statements lend themselves readily to the inference that Kwallek, motivated by a consciousness of her own guilt, refused to cooperate with the police. Nor does it appear to us that there is any realistic likelihood that the jury placed appreciable weight on the challenged statements as evidence of Kwallek's consciousness of guilt.

To constitute plain error, an error must affect a substantial right of the party and be obviously prejudicial. Alaska R. Crim. P. 47(b). Here, assuming admission of the challenged evidence constituted an error affecting Kwallek's substantial rights, we conclude that the error

was not obviously prejudicial. *Van Hatten v. State*, 666 P.2d. 1947, 1056-57 (Alaska App. 1983). Hence, we hold that the superior court did not err in rejecting Kwallek's motions to suppress the June 25 statement.[16]

---

16. Kwallek challenges her conviction on several additional grounds, which require only brief mention:

(a) Kwallek argues that various documents and records seized from her residence were admitted without proper authentication. We hold that the superior court correctly allowed admission of these documents under A.R.E. 901. *See* Eben v. State, 599 P.2d 700, 711 and n.28 (Alaska 1979); United States v. Mazyak, 650 F.2d 788, 792 (5th Cir. 1981), *cert. denied*, 455 U.S. 922, 102 S. Ct. 1281, 71 L.Ed.2d 464 (1982).

(b) Kwallek maintains that the testimony of Robert Stack was improperly admitted, since it had little probative value and was prejudicial. Particularly in light of the limiting instruction given by Judge Schulz, admission of this testimony did not constitute an abuse of discretion. A.R.E. 403; Lerchenstein v. State, — P.2d — , Op. No. 453 (Alaska App., April 5, 1985).

(c) We find Kwallek's challenge to the propriety of the circumstantial evidence instruction to be without merit. *See* Jacobson v. State, 551 P.2d 935, 939-40 (Alaska 1976).

(d) Kwallek alleges that the superior court erred in denying the motion for judgment of acquittal. Upon review of the record we conclude that the totality of the evidence, when viewed in the light most favorable to the state, would permit reasonable jurors to differ as to whether Kwallek's guilt had been established beyond a reasonable doubt. Accordingly we find no error. *See* Dorman v. State, 622 P.2d 448, 453 (Alaska 1981).

(e) We further reject Kwallek's related argument that the trial court erred in denying her post-verdict motion for a new trial. The motion was made on the ground that the verdict was against the manifest weight of the evidence. Having considered the entire record, we conclude that Judge Schulz, in denying this motion, did not abuse the broad scope of his discretion. *See* Amidon v. State, 565 P.2d 1248, 1262 (Alaska 1977); Maloney v. State, 667 P.2d 1258, 1267-68 (Alaska App. 1983).

## SENTENCE

Judge Schulz sentenced Kwallek to serve thirty years' imprisonment. The maximum permissible sentence for the offense is ninety-nine years. A mandatory minimum sentence of twenty years is also prescribed. AS 11.41.100(b); AS 12.55.125(a). Kwallek begins by challenging the constitutionality of the twenty-year mandatory minimum term for first-degree murder.[17] In *Martin v. State*, 664 P.2d 612, 620 (Alaska App. 1983), we expressly rejected an argument identical to that raised by Kwallek under article I, section 12 of the Alaska Constitution. *Martin* is controlling. We have consistently rejected arguments similar to Kwallek's other constitutional claims when they have been raised in the context of Alaska's presumptive sentencing statutes. AS 12.55.125-.185. *See, e.g., Koteles v. State*, 660 P.2d 1199 (Alaska App. 1983); *Wright v. State*, 656 P.2d 1226 (Alaska App. 1983); *Nell v. State*, 642 P.2d 1361, 1367-70 (Alaska App. 1982). We are equally unpersuaded by these arguments in the context of the mandatory minimum sentencing statute. We hold Kwallek's constitutional challenges to be without merit.[18]

---

17. Kwallek maintains that the sentence violated her rights under Alaska Constitution article I, section 12 (penal administration to be based on reformation and protection of the public); she also asserts that the sentencing statute violated the separation of powers doctrine and that it impermissibly invaded the constitutional powers of the governor under Alaska Constitution article III, section 21.

18. We note that Kwallek received a sentence exceeding the mandatory minimum sentence by ten years. There is nothing in Judge Schulz's sentencing remarks to indicate his sentence would have been altered in any way had he been given discretion to impose a sentence lower than the mandatory minimum twenty-year term. Accordingly, there is significant doubt whether Kwallek would be entitled to any actual relief even if the arguments she has raised were meritorious.

Kwallek's final contention is that the thirty-year sentence she received is excessive. The sentencing court adopted the recommendation of the probation officer who wrote Kwallek's presentence report. Judge Schulz carefully explained this sentence in terms of the applicable *Chaney* criteria,[19] indicating that priority should be given in this case to the sentencing goal of community condemnation.

Kwallek was convicted for the intentional and apparently unprovoked killing of her husband. Murder in the first degree stands as the most serious crime found in Alaska's Criminal Code. Based on our independent review of the sentencing record, we find that Judge Schulz did not err in emphasizing the sentencing goal of community condemnation; nor do we find that the thirty-year sentence he imposed is clearly mistaken. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

The conviction and sentence are AFFIRMED.

SINGLETON, Judge, concurring.

With one minor exception I join in the *per curiam* disposition of the issues. I am troubled, however, by the treatment which the *per curiam* opinion and Judge Bryner's dissent give to Kwallek's claims based upon *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966). *See also Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

Judge Schulz held that Kwallek was not in custody when she was interviewed in her own home at the time of

---

19. State v. Chaney, 477 P.2d 441, 443-44 (Alaska 1970).

the service of the search warrants. That finding was not clearly erroneous. Kwallek therefore had no *Miranda* rights to be scrupulously honored. *Beckwith v. United States*, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976).[1] Despite the absence of custody, however, the interrogating officers did give Kwallek *Miranda* warnings at some point during the very brief interview, prompting the concern which forms the basis for Kwallek's *Miranda* claim. Kwallek, whether guilty or innocent, was obviously under a great deal of emotional strain at this point. She initially expressed a willingness to answer police questions at her home but at various points during the brief interview wanted her mother present before answering further questions. At some point the questioning broke off; Kwallek agreed to go to the police station where she was ultimately arrested.

Kwallek submerged her *Miranda* claims in a virtual avalanche of pretrial motions; most of her pretrial claims are addressed in the *per curiam* opinion. Necessarily, Kwallek could give only brief attention to the *Miranda* issue in her presentation to the court. Judge Schulz, after taking the issue under advisement, held essentially three things: first, that Kwallek was not in custody during the interview at her home; second, that she never unequivocally

---

1. The rule that an invocation of the right to remain silent must be scrupulously honored applies to those in custody. *See* Michigan v. Mosley, 423 U.S. 96, 99-100, 96 S. Ct. 321, 324, 46 L.Ed.2d 313, 319 (1975). Where someone who is not in custody responds to police interrogation by invoking his or her constitutional right to remain silent, the admissibility of his or her subsequent statements is measured by the test of voluntariness, not by the *Miranda* safeguards. I do not understand Kwallek to argue that any of her statements were involuntary.

invoked a right to remain silent in response to the *Miranda* warnings; and third, that even if she did invoke a right to remain silent she did not say anything significant in terms of an admission or confession during the course of the very brief interview. Judge Schulz therefore denied the motion to suppress. He made it clear, however, that he might not have fully understood the significance of Kwallek's statements or the purpose to which the state might put them at trial. I read Judge Schulz's comments as indicating a willingness to reconsider the issue if it should appear that Kwallek's responses to the officers became a significant part of the prosecution's case in chief. Looking only to the record before Judge Schulz at that time, I am satisfied that his fact findings were not clearly erroneous. During trial, a transcript of the rather innocuous interview was admitted into evidence. Kwallek's counsel objected to this procedure, renewing her pretrial objections without any elaborations.

On appeal, for the first time, Kwallek additionally contends that her various references to waiting for her mother could have led to a jury inference of consciousness of guilt and should have rejected on that basis. *See, e.g., Elson v. State*, 659 P.2d 1195, 1201 (Alaska 1983). She also makes a related argument that her statements would have been understood by the jury as an invocation of her *Miranda* rights supporting an inference of guilt in violation of her constitutional rights. *See, e.g., Gunnerud v. Sate*, 611 P.2d 69, 75-76 (Alaska 1980). I think there is merit in the argument that the probative value of the interview in support of the state's case in chief was so weak and cumulative of other evidence that upon timely motion the evidence should have been excluded under *Elson* and

Alaska Rule of Evidence 403. Since there was no objection on this ground at trial and since Judge Schulz had earlier indicated a willingness to reconsider the issue after being apprised of the state's theory of the case, it is clear that Kwallek must show plain error in order to obtain a reversal. The state did not argue consciousness of guilt to the jury or appear to recognize the significance of the interview for that purpose. Further, any invocation of Kwallek's *Miranda* rights was at best equivocal and the jury, recognizing the emotional strain that Kwallek was obviously experiencing at the time, could readily understand that whether guilty or innocent Kwallek would like to have her mother present when being interrogated. Given these circumstances it does not appear that the jury would interpret Kwallek's desire to have her mother present as indicating a consciousness of guilt. Under these circumstances, I find no plain error. I therefore join in affirming Kwallek's conviction.

BRYNER, Chief Judge, dissenting.

I am unable to agree with the *per curiam* opinion's conclusion that the violation of Kwallek's *Miranda* rights constituted harmless error.[1] Accordingly, I dissent.

I believe that Kwallek's first request to stop the interrogation until her mother arrived constituted an un-

---

1. My conclusion renders it unnecessary for me to consider whether admission of challenged portions of Kwallek's June 25 interview separately amounted to an impermissible comment on her exercise of the right to silence. *See, e.g.*, Van Hatten v. State, 666 P.2d 1047 (Alaska App. 1983). In all other respects, however, I agree with the *per curiam's* disposition of the issues and join in its opinion.

equivocal assertion of her right to remain silent. If viewed in isolation, this request may — as the majority of the court concludes — seem to be equivocal. However, the request cannot properly be viewed in isolation. It was made as an integral part of a continuing interrogation and must be viewed in context.

Several factors convince me that Kwallek's initial request was an unequivocal assertion of her right to silence. Prior to the first request — immediately after being informed of her *Miranda* rights and immediately before signing a formal waiver of those rights — Kwallek had specifically asked whether she would be permitted to terminate questioning at any time after signing the waiver. Sergeants Lown and Glass assured Kwallek that she could. The police were thus realistically on notice that Kwallek was contemplating the possibility of asserting her right to silence, despite her apparent willingness at that stage to give an initial waiver and to proceed with the interview.

Moreover, the record discloses that the entry of two additional troopers into Kwallek's home during the interrogation for the purpose of executing search warrants was carefully timed so as to coincide with and intensify the ongoing interrogation. Thus, while Kwallek's request to wait was in response to the question concerning execution of the search warrants, it is manifest that the execution of the warrants was, in the understanding of all concerned, integrally related to the ongoing interrogation. Far from unexpected, Kwallek's reaction to the search warrants was predictable; her intent to terminate all questioning should have been obvious.

Furthermore, whatever the ambiguity of Kwallek's request might have been in theory, the record utterly fails

to support a conclusion that the request was ambiguous or confusing in actuality. Sergeant Lown's testimony clearly establishes that he personally construed Kwallek's request as one to terminate the interrogation until she could speak with her mother.

Finally, it is significant that Sergeants Lown and Glass did not treat Kwallek's request as an equivocal statement. The troopers did not seek to clarify the meaning of this request, but rather pressed forward with the interrogation as if no request had been made at all. For the trial court to hold, under these circumstances, that Sergeants Lown and Glass scrupulously honored Kwallek's right to silence was, on this record, clearly erroneous. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). *See also Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975).

Upon reviewing that portion of Kwallek's interview that occurred after she initially asked to wait for her mother, I cannot say that admission of these unlawfully obtained statements was harmless beyond a reasonable doubt. It may well be true that much of the substantive information stated by Kwallek in this portion of the interview was cumulative. If this were all there was to it, a harmless error finding might be tenable.

Yet far more damaging to Kwallek than anything she said was what she did not say. The admission into evidence of the illegally obtained portions of Kwallek's interview disclosed to the jury two separate instances in which Kwallek, when pressed for potentially incriminatory details ceased being cooperative and asserted her right to

silence.[2] The unmistakable and in all likelihood indelible impression created by this evidence is that Kwallek had something to hide — that her refusal to speak was motivated by the consciousness of her own guilt.

Even assuming that admission of evidence of Kwallek's refusals to continue with the interview did not pose independent constitutional problems, the probative value of the refusal evidence as proof of consciousness of guilt was virtually nil. Conversely, its potential for prejudice was extremely high. *See, e.g., Elson v. State*, 659 P.2d 1195, 1201 (Alaska 1983); *Doisher v. State*, 658 P.2d 119 (Alaska 1983); *Dorman v. State*, 622 P.2d 448, 459-61 (Alaska 1981); *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980); *Blue v. State*, 558 P.2d 636, 645 n.21 (Alaska 1977); *Fuller v. Anchorage*, 574 P.2d 1285 (Alaska 1978). *Cf. Coleman v. State*, 658 P.2d 1364, 1366 n.2 (Alaska App. 1983).

Kwallek's case was an extremely close one. Almost all of the state's evidence against Kwallek was circumstantial. The state showed a possible motive and a clear opportunity, but there was little evidence to implicate Kwallek directly. In the face of the state's evidence, Kwallek, from the inception of the investigation through the conclusion of her trial, steadfastly and consistently main-

---

2. My analysis assumes, without deciding, that admission into evidence of Kwallek's initial request to wait for her mother would have been permissible in order to give the jury an understanding of the manner in which the interview was terminated. See United States v. Williams, 556 F.2d 62 (D.C. Cir.), *cert. denied*, 431 U.S. 972, 97 S. Ct. 2936, 53 L.Ed.2d 1070 (1977). Surely, however, admitting evidence of Kwallek's two subsequent requests to wait for her mother could not be justified on this theory. Having heard Kwallek end the interview once, the jury had little legitimate need to hear her end it again and again.

tained her innocence. With one exception, she had always appeared forthright and willing to cooperate. The sole exception was her refusal to speak with Sergeants Lown and Glass during the June 25 interview.

Because the trial court admitted those portions of the June 25 statement that were obtained in violation of Kwallek's right to silence, the jury heard three successive instances in which Kwallek refused to speak. In practical terms, the impact of this evidence could readily have been devastating. This evidence might have made the difference between the finding of a reasonable doubt and the jury's willingness to convict Kwallek. Accordingly, I cannot join the *per curiam* opinion in concluding that admission of the illegally obtained evidence amounted to harmless error.

## APPENDIX B

IN THE COURT OF APPEALS OF
THE STATE OF ALASKA

Court of Appeals No. A-31

PATRICIA KWALLEK,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

ORDER

(Filed August 16, 1985)

Superior Court No. 1KE-82-637 Cr.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

On consideration of the petition for rehearing filed August 8, 1985,

IT IS ORDERED:

The petition for rehearing is denied. However, the language of subsection (b) of footnote 16, page 27 "... the limiting instruction given by Judge Schulz" is amended to "... the limiting instruction proposed by Judge Schulz."

Entered by direction of the court at Anchorage, Alaska on August 16, 1985.

CLERK OF THE COURT OF APPEALS

/s/ Pamela J. McIntire
Chief Deputy Chief

ccs: Counsel

## APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF ALASKA

Supreme Court No. S-1145

PATRICIA KWALLEK,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

ORDER

(Filed November 4, 1985)

Court of Appeals No. A-31
Superior Court No. 1KE 82-637 Cr.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing, filed on September 3, 1985, and the response to the petition, filed on September 23, 1985,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on November 1, 1985.

CLERK OF THE SUPREME COURT

/s/ Pamela J. McIntire
Acting Clerk of Court

[Rabinowitz, Chief Justice, and Moore, Justice, dissent. They would grant the petition as to the issue of failure to break off questioning when requested to do so.]

ccs: Justices
Counsel
Court of Appeals Judges
The Honorable Thomas E. Schulz
Appeals Deputy Clerk, Juneau Trial Courts

## APPENDIX D

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
AT KETCHIKAN

STATE OF ALASKA

Plaintiff,

vs.

PATRICIA LOUISE KWALLEK,

Defendant.

DOB: 12-08-38

CASE NO. 1KE S82-637 CR

JUDGMENT AND COMMITMENT

The defendant came before the Court on June 14, 1983, with his counsel Daniel Westerburg and the District Attorney present. The defendant has been convicted upon finding of guilty by jury of the offense(s) of Murder in the First Degree as charged in Indictment and has been given full opportunity to make a statement in his own behalf.

IT IS ORDERED that the defendant is hereby committed to the care and custody of the Commissioner of the Department of Health and Social Services, State of Alaska, or his authorized representative, for a period of Thirty (30) years A.S. 12.55.125 (a).

It is recommended that: —0—

Any defendant who has received a sentence of more than forty-five days may appeal the sentence on the ground that it is excessive. Upon such appeal made by a defendant, the Supreme Court of Alaska may increase or decrease the sentence and sentence the defendant to any term which might have been imposed by the trial judge.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the

Commissioner of the Department of Health and Social Services of the State of Alaska, or his authorized representative.

June 14, 1983
DATE

Thomas E. Schulz
JUDGE

## APPENDIX E

### STATEMENT OF PATSY KWALLEK

We're now on tape, ah the time is 1:48 p.m. Today's date is 6/25/82. We're at the KWALLEK residence, Mile 11 North Tongass, Ketchikan. Present are Patsy KWALLEK, and Sgt. Robin Lown, Alaska State Troopers, and Sgt. John Glass, Alaska State Troopers.

Q: Ah, Patsy we have just had Sgt. Rogers bring you back to your residence from ah, the JAHNKE residence, do you understand, realize that you're not under arrest?

A: Yeah.

Q: Okay. You understand that you're free to get up and leave anytime you wish?

A: Yep.

Q: And that you're not under arrest at this time, so you do have the option getting up and leaving. Patsy we want to go back and talk ah, some more about what happened here at the house yesterday morning, and maybe what has happened over the last couple of weeks. Ah, we've got reason to believe that there, everything that you've told us is not exactly the way things happened.

A: I'll try to help anyway I can.

Q: Okay. Well I think we have a story that needs to be told and in order for us to ah, help you and to be of any service to you, we've got to know the true story, of what happened yesterday morning.

A: I'll help you if I can.

Q: Why don't you tell us again what happened here yesterday morning, Patsy.

A: I got up about 6:30, fixed his lunch like I always do. I got out clean clothes for him. Changed everything over in his billfold. He did his exercises. (inaudible) then he was looking out the window. I got the dogs out, I called them back in. I always open the door for him, cause he has a cup of coffee in one hand and his lunch sack in the other. I told him good-bye, and I had come back in, and I heard they were like pop noise, and I heard him screaming my name, and I went out and looked for him.

Q: Then what happened Patsy?

A: I come back in to call the ambulance when I found him, and I was on the phone screaming at them, the doors [sic] were back by the bedroom door there, and they barked at me and there was like ah, ah, squeaky, creaky bong noise, and I just went back outside.

Q: Do you know what the squeaky bonk noise was?

A: No I don't.

Q: When you talked to me yesterday about it, you said that it was a noise that you had heard before.

A: I think I have heard it before, but I do not know what it was.

Q: Do you have any idea what it might have been?

A: No. Somebody asked me if it could be a file cabinet, but it wasn't a noise like a file cabinet.

Q: Well Patsy we don't think that's exactly what happened here yesterday.

A: That's . . . just what happened. (inaudible)

Q: We have reason to believe that something else might have happened here yesterday, Patsy and that you knew more about it than what you're telling us.

A: I don't think so, I know what happened.

Q (Lown): Is there a ah, .22 caliber weapon in the house?

A: She, he's got either two or three 22 pistols, I think only two, and there's an old 22 rifle.

Q (Lown): Where's the old 22 rifle kept?

A: He keeps it here in the, in the gun cabinet.

Q (Lown): Where's [sic] the last time you saw that gun?

A: Oh, I really don't us it too often.

Q (Lown): You know what kind of rifle it is?

A: No, it just, it's just ah, I think it's an automatic. Ah, hotshot, and I can't remember when the last time we took it out. We don't use it too much.

Q (Lown): Is it normally kept loaded?

A: Not unless it would have been put away loaded, we then normally keep unloaded around here. In fact, I don't even know if he keeps his 44 loaded anymore because of the Brand kid deal, we always kept a pistol or something loaded, in the house.

Q (Lown): Now, you're saying that you went outside and you didn't see anybody?

A: I didn't see a soul. Not one soul.

Q (Lown): Whe, [sic] when you heard these pops where did they sound like they were coming from?

A: Just outside, but really I didn't pay any attention. They were pops sorta like they remind me what we hear when they shoot up the gun club, and we don't pay any attention to that cause they shot up there morning and the night.

Q (Lown): How long after you heard these pops did you go to the door?

A: When I heard him screaming.

Q (Lown): How long was that?

A: I really don't know. I was back and physica [sic] in here, and I heard him scream my name and I went running out there.

Q (Lown): What was it a long time?

A: No it wasn't very long, I'm sure.

Q (Lown): Was it more than ah, a minute?

A: I don't know, I really don't know. I can remember I had a towel in my hands.

Q (Lown): And you heard these three pops . . . I don't even know how many pops I heard, they were just like, like pop noises.

Q (Lown): Okay you heard some pops. and then you immediately went to the doorway . . .

A: No, I was standing here, I, gues [sic], I just heard these pop noise and I hear, heard Spader screaming, Patsy and I went out there and trying to find him.

Q (Lown): You have no recollection of all of how long after these pop noises before he started screaming?

A: No I don't. I just really pay any attention.

Q (Lown): And you didn't see . . .

A: To those pop noises.

Q (Lown): And you went out, see if I got this correct now, you went out down the stairs looked towards the truck, is that correct? You didn't see anybody?

A: Yeah, I walked around the front of the pick-up, his cup was laying there in the, in the road and I walked all around it, he was laying up against the side of the, the shop building there.

Q (Lown): You didn't see anybody else?

A: I didn't see anybody, they asked me if I heard anything, as far as cars . . .

Q (Lown): Okay.

A: I just . . .

Q (Lown): Did you go back, immediately go back into the house?

A: I now [sic] that I as I sort ah, looked at him, I come running back here into the house and I got on the telephone, call, I had to dial twice. I can remember that. And the dogs were barking, and the only noise that I heard was this drawers that I told you about, I don't know what it was.

Q: Patsy did you hear any pops after the initial ones?

A: Not that I remember, I. She asked me a couple of things she wanted to know the fire number and I

couldn't remember the fire number I was telling her that it was, who we were and finally I said I think it's 118.

Q (Lown): Now Patsy you were wearing a ah, ah, robe and what color is that robe?

A: I think I had on a white one yesterday morning.

Q (Lown): Okay is this the kind that you slip over your head and zip up the front?

A: Umuh (yes).

Q: (Lown): Okay is that robe still in the house?

A: It should be.

Q (Lown): Okay, ahm, was there any occasion that you had while, yesterday, while wearing that robe to be in the attic?

A: No.

Q (Lown): None at all?

A: No. I wasn't in the attic yesterday. Ta . . .

Q (Lown): So you changed that robe after we had arrived and you were going to go the JAHNKE house, you changed that robe?

A: Umuh (yes).

Q (Lown): What did you do with the robe?

A: I think I left it in the bedroom.

Q (Lown): Okay. Patsy before we go any further, ah, we're obligated to advise you of your constitutional rights.

A: Okay.

Q (Lown): And I'm going to read this to you, I'll fill in the place, date and time. And your last name is spelt K . . .

A: W A L L E K.

Q (Lown): Okay, the place is at the KWALLEK residence, the time, or the date is 6/25/82, and the time now is 1:56 p.m. Before we ask you anymore questions you must understand your rights. You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. If you can not afford a lawyer one will be appointed for you before any questioning if you wish. You can decide to answer questions now without a lawyer present, you still have the right to stop answering at anytime. You also have the right to stop answering at anytime until you talk to a lawyer. Do you understand that?

A: Yep.

Q (Lown): Okay. What I would like you to do, Patsy, is read these on you own here, right down to here, so we can be absolutely sure that you understand what we're, what we're telling you. Do you understand each and everyone of those?

A: Yeap.

Q (Lown): Would you do me a favor, Patsy, and just in front of this would you put you initial, so I'll know that you read'em and understood'em. Would you do that for me please? Okay you also understand this

one, and these other three here that aren't right out to the margin here. Do you understand these three too?

A: Umuh (yes).

Q (Lown): Okay. Would you initial those three also, please? Okay this next statement below that is a waiver of rights, and it states: I have read this statement of my rights, and understand what my rights are, I am will to make a statement and answer questions. I do not want a lawyer at this time. I understand and know, that I, what I am doing. NO promises or threats have been made to me, and no pressure or coercion of any kind has been used against me. Do you understand that?

A: Um (yes).

Q (Lown): What I'm going to ask you to do Patsy, is for us to continue talking to you we would like you to sign this particular statement indicating that you understand it and that you're willing to continue to talk to us. Do you understand that?

A: Can I still stop then if I want to?

Q (Lown): Certainly, that's what it says.

A: Anytime I want to.

Q (Lown): Yes, that what, that's what the waiver says.

A: Okay.

(Sounds of writing in the background)

Q (Lown): Okay the time now is 2:00 o'clock p.m., and I'll sign it here as a witness and Sergeant Glass will

also sign it here, as a witness. Okay, Patsy the reason we do this is because we're, we're required to. It's a requirement in order for us to talk to you, that we advise you of your rights. And you do understand your rights?

A: Right.

Q (Lown): OK. Patsy ah, now you, I asked you a little bit earlier about this, this rifle .22 caliber rifle . . .

A: Umuh (yes).

Q (Lown): . . . okay, and you say it's normally kept in the ah, . . .

A: Gun cabinet.

Q (Lown): gun cabinet right here in the hallway?

A: Umuh (yes).

Q (Lown): Okay. Ah, is there any reason why that would be moved?

A: It shouldn't be, but (inaudible) reason to, we keep the rifles here. We kept a pistol in the dresser drawer, and we keep the other one in the file cabinet.

Q (Lown): Would you, would it be fair to say that ah, ahm, that, that rifle would normally be stored unloaded?

A: Normally it is.

Q (Lown): Okay, do you. . . .

A: The only time that rifle has ever been taken out around here, is a couple of times Spade's taken it out shot at a rat. He knows he shouldn't because it's close to people, and it's too close to the highway.

Q (Lown): Okay. Ah, have you ever found that rifle loaded? In the gun cabinet?

A: Umuh, never looked to see if it was loaded.

Q (Lown): To the best of your knowledge it would normally be unloaded?

A: Um (yes) we normally put everything away unloaded. There are times a gun has been brought in loaded.

Q (Lown): Do you remember what kind of rifle that was?

A: All I know is it's a 22. I don't know the brand on it.

Q (Lown): What ah, what kind of a stock does it have?

A: What is a stock look like (inaudible both are talking).

Q: (Lown): Brown wooden stock?

A: Brown color of some kind like, you know, like all different stocks are.

Q (Lown): Okay just a standard brown wooden stock. Ahm, do you remember what kind of a magazine it has, where you put the bullets in?

A: Sir, the tube one.

Q (Lown): It's a tube feed?

A: Umuh (yes).

Q (Lown): Okay. Okay, Patsy, ah, would there any be, be reason for that weapon to be in the attic?

A: None whatsoever.

Q (Lown): None whatsoever. Were you, and I think I asked you this earlier, were you in the attic yesterday?

A: No I wasn't in the attic yesterday, or in the attic the day before, I was in the attic the day before, I was on the attic the day before.

Q (Lown): You were in the attic the day before that?

A: Umuh (yes).

Q (Lown): Do you remember what you were wearing when you were in the attic the day before?

A: No. (pause) Probably my robe.

Q (Lown): Okay.

A: Went up there looking for stuff, in fact, last couple of days I left the attic door open, so hot up there, hoping that it would cool off a little.

Q (Lown): Okay.

A: Besides that I was silly, that wouldn't help a least bit, if I wanted to go ahead.

Q (Lown): Umuh (yes). Okay, ah, . . .

A: And stuff drifts down so bad when you leave it open, but . . .

Q (Lown): Did you leave the attic open yesterday?

A: Ah, was didn't do yesterday.

Q (Lown): The day before?

A: (inaudible)

Q (Lown): Did you leave it open?

A: Uhuh (yes).

Q (Lown): You did leave it open the day before?

A: Closed it up, uhuh (yes).

Q (Lown): Did you close it at night?

A: Spader closed it up, I think, or I did, I can't remember what after a bad time around here. He came in, we'd been working out there and he came in, we were sorting through some more of those ah, cases Ben gave us, cause he gave us a whole, we'd been trap shooting a lot. He gave us a bunch of paper ones and we'd been sorting through those, because Spader can't find the load that, I don't know, if it's a trap loader or what, and he didn't said he didn't think we were going to be able to beat it so.

Q (Lown): Okay, you say you've had no problems with ah, with your husband. . . .

A: No.

Q (Lown): . . . as far as arguments or anything like that?

A: If Spader does get mad, he gets mad for a few minutes and then he gets over it.

Q (Lown): He doesn't, doesn't hold a grudge about anything?

A: Nope. He just wants his say and then he's fine.

Q (Lown): Okay. Ah, have you been, been having any money problems recently?

A: I'm behind in a whole bunch of things.

Q (Lown): Is there any reason why you should be?

A: Just because I don't manage right, and I haven't been working.

Q (Lown): Did that annoy your husband?

A: It, if anything doesn't get paid it annoys him.

Q (Lown): Do, do you recall how much your behind and on what?

A: Well I'm mers paid, we're behind on our taxes. I'm going to have to tell him about that.

Q (Lown): Do you know how much dollar amount you are behind?

A: Umuh (no), umuh (no).

Q (Glass): When are the taxes due Patsy?

A: When it where ah, ah, the 80 taxes.

Q (Glass): For 80 taxes?

A: Umuh (yes).

Q (Glass): When did you quit working at Southeastern Electric?

A: In May of ah, a year ago. May of ah, 81.

Q (Glass): 81. Has your financial troubles ah, started after that?

A: Most of them.

Q (Glass): Did Spade get upset over the fact that you were having financial problems?

A: Yes he gets upset over it.

Q (Glass): Was he, wa, aware of all the financial problems?

A: No he wasn't.

Q (Glass): Did you keep these financial problems from him?

A: Yes, I did.

Q (Glass): Was there a reason for that?

A: Cause he gets so upset over it. I just, I'm going to have to sit down and talk to him cause he'll do one of two things, he'll either get everything straightened up or he'll says that we'd just better go our separate ways, that's just the way he is.

Q (Lown): Have you had any medication today?

A: No, they gave me something last night, just, you know . . . , just want to sleep.

Q (Glass): Were you sleeping when Sergeant Rogers come up to get ya?

A: Umuh (yes).

Q (Lown): Okay, well, what we have here Patsy, we have a couple of search warrants for your house.

A: Okay.

Q (Lown): We have a search warrant here and you might want to read it. This is your copy of it, for you nightgown, or your bathrobe, or robe . . .

A: (inaudible).

Q (Lown): and for a sample of insulation out of your attic, we also have a search warrant here for bank and bookkeeping records of your husband and yourself.

A: Okay.

Q (Lown): You are, you have now been served with copies of each of these search warrants. We're going to have the Troopers outside, who are investigators from Anchorage come in and conduct this search. do you have any questions about that?

A: No. I think I should wait and talk with my mom gets here before I say what to do.

Q (Lown): Okay.

Q (Glass): Was Spade upset yesterday, Patsy when he left for work?

A: No he said good morning, joked ah, he's [sic] back's been feeling good because of the sun. Bothering was his ankle and his toe, he, he's got bad ankles, and they, he turns them and they hurt. And his toe gets sorta swollen and his ankle when he takes his shoes off.

Q (Lown): Do you remember what happened yesterday morning?

A: Ah, the same thing that happens every single morning, he (pause) ....

Q (Glass): Wasn't yesterday morning a little different, Patsy?

A: No. Other than what happened, it wasn't any different between Spader and I.

Q (Glass): Well Patsy we found the rifle in the attic.

A: Oh, no reason for a rifle to be in the attic.

Q (Lown): We found the bullets in the rifle that matched the ammunition in the reloading room. We recovered

a bullet from the body of your husband that matches the bullets in the rifle . . .

A: Umuh (yes).

Q (Lown) . . . we recovered the casings from the spent cartridges right outside your front door.

A: Umuh (yes). I didn't see anybody outside the front door.

Q (Lown): Patsy, there was something more going on that [sic] what's you're telling us about. Your husband and we've heard this from several people, was not just a little bit mad, about loosing his boat slip, he was extremely mad about it. He was extremely mad because the bill hadn't been paid, because something you were suppose to do, you had not carried through with.

A: That's right but he said when they took the, the deposit and then that covered it, and then the stall should still be ours.

Q (Lown): Well checking the records with the ah, boat harbor people, indicated that the bill was not paid.

A: Well that's what they say but yet . . .

Q (Lown): We've also checked other people in town, ah, the building company, ah, the people that hauled in the gravel out here, for your shop that he was building, none of those bills were paid.

A: Not yet they haven't been.

Q (Lown): Why hadn't those bills been paid?

A: (inaudible) At this point there's no money to pay for them.

Q (Lown): Now Spade was ah, who everybody we've talked to was a very, very punctuatal person about

paying his bills, I mean he prided himself on paying his bills all the time. He prided himself on being current and never being behind . . .

A: Umuh (yes).

Q (Lown): . . . times on bill . . .

A: Umuh (yes).

Q (Lown): . . . and all of a sudden he wakes up and find himself, people aren't delivering supplies that he wants unless he pays cash. Now apparently it appears that he thought all these bill were paid. Is there any reason why he would thinks [sic] these were paid and they weren't?

A: Because I hadn't told him anything.

Q (Lown): Well ah, he's the one who provides the income, is, isn't that correct?

A: Umuh (yes).

Q (Lown): And ah, he knows how much money he makes doesn't he?

A: Umuh (yes).

Q (Lown): Does he receive a paycheck?

A: Umuh (yes).

Q (Lown): So he would know if there was money to pay the bills, is that correct?

A: (pause) Umuh (yes).

Q (Lown): It is correct? So he assumed the bills were paid, he would know if there was money present or

not, so he would have to assume that there was money enough to pay the bills.

A: Umuh (no).

Q (Lown): There wasn't money enough to pay the bills?

A: (no verbal response).

Q (Lown): How come?

A: There just wasn't cause it was gone.

Q (Lown): What happened to it?

A: I will talk when my mom gets here, she can help.

Q (Glass): You want to wait until your mom gets here to talk to us?

A: (inaudible both are talking) she should be here in just a little while. Chris is getting her now.

Q (Glass): Do you want to talk to us then, Patsy when she gets here?

A: Uhuh (yes). Is it [sic] be that okay?

Q (Glass): Sure.

A: (Lown): Sure, that's fine.

Q (Glass): In the mean the [sic] time we'll just sit here and wait, and let the other two investigators go ahead and ah, maybe you can tell us where the ah, bank records ah, are? Do you have a checking account Patsy?

A: Umuh (no).

Q (Glass): No checking account? How do you keep track of your ah, bills?

A: Spader keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

Q (Glass): You don't have a checking account?

A: No.

Q (Glass): has he ever had a checking account?

A: No.

Q (Glass): Ah, your, your background Patsy and your training has been in bookkeeping is that correct?

A: Umuh (yes).

Q (Glass): Do you keep any kind of books at all? On the money spent out?

A: Umuh (no). No.

Q (Glass): Who come that is?

A: I don't know I just, mom gets here we'll talk about it.

Q (Glass): Okay. At the time is approximately 2:14 p.m. we'll go off record.

Supreme Court, U.S.
FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1146

PATRICIA KWALLEK,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

# RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

HAROLD M. BROWN
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: David Mannheimer
Assistant Attorney General

Office of Special Prosecutions and Appeals
1031 W. 4th Ave.
Suite 318
Anchorage, Alaska 99501
(907) 279-7424

TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | iii |
| Jurisdiction | 1 |
| Question Presented | 2 |
| Statement of the Case | 3 |
| A. The Facts | 3 |
| B. Procedural Background | 9 |
| Reasons for Denying the Writ | |
| I. Miranda Was Not Violated Because Kwallek Was Not In Custody | 13 |
| II. Assuming Miranda Does Apply, Kwallek's First Statement About Talking To Her Mother Was Not An Unequivocal Assertion of Her Right To Remain Silent | 18 |

Page

III. The Alaska Court of Appeals Properly Applied the Harmless Error Standard of Chapman v. California in Concluding That the Error in the Admission of Kwallek's Statements Made After the Second Statement About Talking to Her Mother Was Harmless Beyond a Reasonable Doubt 24

IV. This Court Does Not Have Jurisdiction to Consider the Doyle Issue 30

CONCLUSION 33

APPENDIX

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Beckwith v. United States, 425 U.S. 341 (1976) | 14 |
| California v. Beheler, 463 U.S. 1121 (1983) | 13 |
| Chapman v. California, 386 U.S. 18 (1967) | 10, 24, 27 |
| Davis v. Allsbrook, 778 F.2d 168 (4th Cir. 1985) | 15 |
| Doyle v. Ohio, 426 U.S. 610 (1976) | 1, 12, 30, 31 |
| Kwallek v. State, Alaska App. Memorandum Opinion No. 883 (July 24, 1985) | 9 |
| Lloyd A. Fry Roofing Company v. Wood, 344 U.S. 157 (1972), rehrg. denied, 345 U.S. 913 (1953) | 28 |

| | Page |
|---|---|
| Michigan v. Mosley, 423 U.S. 96 (1975) | 13, 15 |
| Michigan v. Tucker, 417 U.S. 433 (1974) | 14 |
| Miranda v. Arizona, 384 U.S. 436 (1966) | 1, 5, 9, 10, 11, 13, 14, 15, 16, 18 |
| Oregon v. Mathiason, 429 U.S. 492 (1977) | 14 |
| Taylor v. Riddle, 563 F.2d 1336 (4th Cir. 1977) cert. denied 434 U.S. 1020 (1978) | 20 |
| United States v. Mast, 735 F.2d 745 (2nd Cir. 1984) | 15 |
| United States v. Serlin, 707 F.2d 953 (7th Cir. 1979) | 15 |
| Vail v. State, 599 P.2d 1371 (Alaska 1979) | 20 |

| | Page |
|---|---|
| Wilson v. Cook, 327 U.S. 474 (1946) | 32 |

Statutes and Rules

| | |
|---|---|
| 28 U.S.C. §1257 | 1 |
| 28 U.S.C. §1257(e) | 32 |
| Alaska R. Crim. P. 47(b) | 12 |

## JURISDICTION

Kwallek seeks discretionary review of two issues: (1) an alleged violation of Miranda v. Arizona, 384 U.S. 436 (1966), and (2) an alleged violation of Doyle v. Ohio, 426 U.S. 610 (1976). Kwallek has properly invoked this Court's jurisdiction under 28 U.S.C. §1257 with respect to the Miranda issue. With respect to the Doyle issue, Kwallek satisfies the requirement of having received a final judgment from the highest state court in which a decision could be had, but does not satisfy the requirement of having a decision from the highest state court on the merits of the claim. This will be discussed more fully in the Argument section of the State's response.

## QUESTION PRESENTED

Should the trial court have suppressed Kwallek's statements made after she indicated that she wanted to talk her mother when the statements were made during a non-custodial interview?

## STATEMENT OF THE CASE

### A. The Facts

Patricia Kwallek's husband was shot five times in the chest, neck and head as he was leaving for work on the morning of June 24, 1982. One of the bullets entered his brain and was instantly fatal.

When the state troopers arrived at the scene, Kwallek was watching the emergency medical technicians treat her husband. Kwallek, clad in an off-white robe, told the troopers that she did not know what happened. She explained that her husband had just left for work when she heard some "popping" sounds and her husband scream "Patsy". She ran outside and found her husband lying by the shed. She did not see anyone in the area, nor did she hear any vehicles.

Seven neighbors were interviewed. Six of them heard shots being fired, while one heard nothing unusual until the ambulance siren. Four of the neighbors heard loud voices in addition to the gunshots. Loy Price could not make out what was being said. Lou Ann

Cottle heard the words, "What are you doing, I haven't done anything." and "What's going on here." Mrs. Cottle was certain that the voices she heard belonged to a male, but she could not tell whether the voices were from one or two individuals. Greg Boles heard only one voice, that of a male screaming something to the effect of "Oh, my God", and "I didn't mean it." Mr. Neitzke heard two men shouting at each other, but was unable to discern any words. None of the neighbors saw anyone running away, or any vehicle speeding away.

The area surrounding the Kwallek residence was searched for a sniper. When no one was found, the police began looking for evidence. Three .22 caliber shell casings with "F" logos on them and a live bullet were found by the oil tank near the only door to the Kwallek residence. Two brands of .22 caliber ammunition were found in the second bedroom -- Federal (bearing an "F" logo) and CCI (bearing a "C" logo). In the attic, partially hidden under a box and insulation, was a .22 caliber

automatic rifle belonging to the Kwalleks. Ballistic tests confirmed the police officers' suspicions that this was the murder weapon.

The following afternoon Kwallek agreed to be interviewed by Sgt. Lown and Sgt. Glass of the Alaska State Troopers. The interview took place in Kwallek's kitchen. Eight minutes into the interview Sgt. Lown advised Kwallek of her Miranda rights, and Kwallek executed a written waiver. Kwallek maintained that she did not know who shot her husband. She acknowledged that she was behind on a lot of the bills and that she had not told her husband because she feared he would divorce her.

Near the end of the interview three other troopers entered the Kwallek residence to execute search warrants. These warrants authorized seizure of financial records, a sample of insulation from the attic, and the off-white robe Kwallek was wearing when her husband was shot. Copies of the warrants were given to Kwallek, and Sgt. Lown told her what they were looking for. Sgt Lown then

explained that she had been formally served with copies of the warrants and that the other troopers would conduct the search. He then posed the following question, "Do you have any questions about that?" Kwallek responded, "No. I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sgts. Lown and Glass said nothing further about the search warrants, and switched the topic of conversation back to the events of the previous morning. They also questioned Kwallek about the unpaid bills. Kwallek explained that the bills had not been paid because there was no money to pay them. When asked where the money had gone, Kwallek told the troopers that she wanted to wait till her mother arrived because her mother could help. Kwallek's mother was due to arrive shortly and Kwallek agreed to talk then. Sgt. Glass, after informing Kwallek that the other troopers would begin the search, asked her where the bank records and checkbook were kept, apparently to aid the troopers

in locating the items listed on the warrant. Kwallek stated that her husband did not have a checking account and that she did not keep any books regarding household expenditures. When asked why she did not keep any records, Kwallek reiterated that she wanted to wait until her mother got there. The interview was formally terminated at that time.

Kwallek later agreed to accompany the troopers to the station and wait for her mother there. While Kwallek awaited the arrival of her mother, some of the investigating troopers and the district attorney met to discuss the case. At that time the decision was made to arrest Kwallek. Kwallek made no further statements to the troopers after she was placed under arrest.

Kwallek's robe was sent to a crime lab for analysis. Substantial amounts of lead residue was found on the right sleeve. The pattern of residue was consistent with the pattern which would be created if Kwallek had pulled the trigger of the murder weapon with her left hand. Kwallek is left-handed.

Substantial evidence of the couple's financial problems was introduced at trial, including outstanding bills and letters from creditors. Several of Kwallek's friends testified that Kwallek had borrowed a total of $11,500 from them. There was also evidence that Kwallek's husband, who had been kept in the dark about the financial problems, had discovered the existence of two outstanding bills just prior to the murder. The state theorized that Kwallek and her husband fought about finances on the morning of the murder and that her husband had threatened to divorce her.

Kwallek claimed had no idea who shot her husband or why. She proposed a "mysterious gunman" who stole the murder weapon from the Kwallek residence sometime prior to the shooting, lay in wait for Kwallek's husband to leave for work on the morning of the murder, shot him, sneaked back into the Kwallek residence through its only door, hid the murder weapon in the attic, and then left

the Kwallek residence (all without being seen by Kwallek or anyone else).

Kwallek was indicted for murder in the first degree. A jury found her guilty as charged.

B. Procedural Background

Kwallek appealed her conviction to the Alaska court of appeals. She argued, among other things, that she was in custody from the beginning of the interview and that her statement should have been suppressed under Miranda v. Arizona, 384 U.S. 436 (1966), because she was not advised of her Miranda rights at the beginning of the interview. Alternatively, she contended that the portion of the interview following her first statement that she wanted to talk with her mother should have been suppressed because the continued questioning violated Miranda.

The court of appeals issued a per curiam, unpublished opinion. Kwallek v. State, Alaska App. Memorandum Opinion No. 883 (July 24, 1985). (A copy of the decision is attached to Kwallek's

petition for writ of certiorari as Appendix A. The state will cite the decision as "Slip opinion, p. ___.") The court concluded that Kwallek was not in custody at the start of the interview. It assumed without deciding that the interview had escalated into a custodial interrogation at the time Kwallek was advised of her Miranda rights. (Slip opinion, p. 23 n.14) Proceeding on this assumption, the court of appeals held that Kwallek's initial statement about talking to her mother was made in response to a question about the search warrants and, therefore, did not amount to an unequivocal assertion of the right to remain silent to all further questioning. (Slip opinion, p. 24) Kwallek's second statement about talking to her mother, however, did amount to an assertion of her right to remain silent, so the remaining dialogue should have been suppressed. (Pet. App. A, p. 24-25) Applying the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967), the court concluded that Kwallek had not been harmed by the

admission of the statements she made after this point. (Slip opinion, p. 25)

Judge Singleton, in a concurring opinion, disagreed about the treatment of the custody issue. He would affirm the trial court's finding that Kwallek was not in custody during the interview. Since Kwallek was not in custody, Miranda did not apply, so there was no reason to decide whether Kwallek had invoked her right to remain silent. (Slip opinion, p. 29-30) Judge Bryner dissented. He implicitly determined that Kwallek was in custody by the time she said something about wanting to talk to her mother. Judge Bryner would conclude that Kwallek's first statement about talking to her mother constituted an unequivocal assertion of her right to remain silent and that the failure to suppress the remainder of the interview was not harmless error. (Slip opinion, p. 32-34)

For the first time on appeal Kwallek argued that admission of the statements about wanting to talk to her mother amounted to an impermissible

comment on her right to remain silent in violation of Doyle v. Ohio, 426 U.S. 610 (1976). Because the issue had not been raised in the trial court the court of appeals applied the plain error standard of review under Rule 47(b) of the Alaska Rules of Criminal Procedure. It held that even if there were error, the error was not "obviously prejudicial". Given this holding, the court decided it was not necessary to reach the merits of the Doyle issue. (Slip opinion, p. 25-27)

Kwallek petitioned the Alaska supreme court to review the decision of the court of appeals. The Alaska supreme court denied review, and Kwallek has now petitioned this Court for a writ of certiorari to the Alaska court of appeals for review of its decision.

## REASONS FOR DENYING THE WRIT

### I. MIRANDA WAS NOT VIOLATED BECAUSE KWALLEK WAS NOT IN CUSTODY

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that the prosecution may not use statements made during the course of a custodial interrogation unless it demonstrates that the detained person was advised of and voluntarily waived his right to remain silent and his right to counsel. A defendant may exercise his right to remain silent or his right to counsel at any time during a custodial interrogation. His exercise of either or both of these rights must be scrupulously honored. See also Michigan v. Mosley, 423 U.S. 96, 104 (1975).

Cases decided since Miranda make it quite clear that Miranda warnings need only be given to persons who have been taken into custody or have otherwise been deprived of their freedom of action in any significant way. See e.g., California v. Beheler, 463 U.S. 1121

(1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341, 345-46 (1976). The requirement that Miranda warnings be given is limited to custodial interrogations because of the coercive nature of these interrogations. The defendant, who is generally isolated in the police station, may feel he is under a compulsion to speak unless he is fully advised of his rights. This inherently coercive atmosphere is not present in non-custodial settings, so Miranda warnings are not required.

As this Court stated in Michigan v. Tucker, 417 U.S. 433, 444 (1974):

> The Court recognized that these procedural safeguards [Miranda warnings] were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory incrimination was protected.

Since Miranda warnings are not rights in and of themselves, and since Miranda applies only to those who are in

custody when interrogated, it follows that Miranda and Mosley cannot be violated unless the person being questioned is in custody at the time he made the statements.

The defendant in Davis v. Allsbrook, 778 F.2d 168 (4th Cir. 1985), voluntarily appeared at the police station for an interview. He was read the Miranda warnings, and he signed a written waiver agreeing to talk to the police. Sometime into the interview the defendant indicated that he no longer wanted to talk to the police. Nevertheless the police continued asking questions. Eventually he made some inculpatory statements. The court of appeals for the fourth circuit held that Miranda did not apply because the defendant was not in custody. Id. at 170. See also United States v. Mast, 735 F.2d 745, 749 n.4 (2nd Cir. 1984); United States v. Serlin, 707 F.2d 953, 958 (7th Cir. 1983).

Kwallek was not in custody during the June 25th interview. Thus, Miranda does not apply. Kwallek was

interviewed in the kitchen of her home. She was explicitly told at the beginning of the interview that she was not under arrest and that she could leave at any time. The troopers did not place Kwallek under arrest several hours later.

The trial court found that Kwallek was not in custody during the interview. Kwallek appealed that finding to the Alaska court of appeals. The court of appeals dealt with it in two ways. Judge Singleton concluded that the trial court's finding was not clearly erroneous. (Slip opinion, p. 30) The per curiam opinion ruled that Kwallek was not in custody at the beginning of the interview, and assumed without deciding that the interview had escalated into a custodial interrogation by the time the Miranda warnings were read. (Slip opinion, p. 22-23) Kwallek did not appeal the trial court's finding to the Alaska supreme court, and has not sought review of it by this Court. Since the trial court's finding Kwallek was not in custody during the interview has not been overturned, Miranda does not apply.

Kwallek's voluntary statements were properly admitted at trial.

II. ASSUMING MIRANDA DOES APPLY, KWALLEK'S FIRST STATEMENT ABOUT TALKING TO HER MOTHER WAS NOT AN UNEQUIVOCAL ASSERTION OF HER RIGHT TO REMAIN SILENT

Kwallek's police interview was interrupted after about twenty minutes when other troopers entered the Kwallek residence to serve several search warrants. The topic of discussion turned to the warrants. The following exchange then took place:

> Sgt. Lown: We have a search warrant here and you might want to read it. This is your copy of it, for your nightgown, or your bathrobe, or robe ...
>
> Kwallek: (inaudible)
>
> Sgt. Lown: ... and for a sample of insulation out of your attic; we also have a search warrant here for bank and bookkeeping

records of your husband and yourself.

Kwallek: Okay.

Sgt. Lown: You are, you have now been served with copies of each of these search warrants. We're going to have the Troopers outside, who are investigators from Anchorage, come in and conduct the search. Do you have any questions about that?

Kwallek: No. I think I should wait and talk with my mom [when she] gets here before I say what to do.

Sgt. Lown: Okay.

The questioning then returned to the events of the morning of the murder. A few minutes later Kwallek told Sgt. Lown that she did not want to talk anymore until she had the opportunity to confer with her mother.

The trial court and the Alaska court of appeals properly concluded that this initial statement by Kwallek about wanting to talk to her mother was not an

unequivocal assertion of the right to remain silent. The flow of the interview was interrupted when the troopers came in to serve the warrants. Kwallek's statement was in response to an inquiry whether she had questions about the warrants which she had just received. Kwallek said she had no questions, but that she wanted to talk to her mother before saying what to do about the warrants. Under the circumstances, Kwallek's statement was not an unambiguous request to terminate the entire interview. See Taylor v. Riddle, 563 F.2d 1336 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (suspect's statement that "[y]ou've done asked me a question I can't answer," was an expression of his inability to answer a question; it did not amount to an invocation of his right to remain silent); Vail v. State, 599 P.2d 1371, 1378 (Alaska 1979) (defendant's remark that he did not want to talk about his co-defendant was not an unequivocal assertion of his right to remain silent).

Kwallek asserts that Sgt. Lown interpreted this response as an assertion of her right to remain silent. She cites to the following testimony given by Sgt. Lown at the omnibus hearing:

> Q: [Defense counsel] Now, at some point Mrs. Kwallek, during the interview, indicated that she didn't want to talk any more, is that correct?
>
> A: [Sgt. Lown] Yes.
>
> Q: At what point did she first make that indication?
>
> A: She stated she did not want to talk until after she had talked to her mother.
>
> Q: All right, and was that around the time when the other troopers were coming in to execute the warrants?
>
> A: I believe it was.
>
> Q: Did you and Sergeant Glass then continue to ask her

questions after that point?

A: I believe she was asked a few questions, yes.

Q: Isn't it normal practice that when the subject requests that no more questions be answered, or asked rather, or requests that she doesn't want to talk any more, that the officers are supposed to discontinue questioning?

A: Yes.

Q: But you nevertheless, you and Sergeant Glass, continued to ask questions after that point?

A: We asked her some general questions, yes.

Q: And did she, subsequent to that first -- after she first made an indication she didn't want to talk any more, or she wanted to discontinue the questioning, did she repeat it at a later time?

A: General questions. (O.H. Tr. 75-76)

This is a short excerpt from Sgt. Lown's extensive testimony concerning a number of Kwallek's pretrial motions, including her motion to suppress her June 25th statement. It is not clear whether Sgt. Lown was referring to the first statement about Kwallek's mother or those which appear later in the interview. Kwallek never presented Sgt. Lown with a copy of the transcript of the interview so that he could refer to a specific statement by Kwallek. Given the ambiguous nature of the testimony, and Kwallek's failure to clarify it at the omnibus hearing, she cannot now rely on it as proof that Sgt. Lown interpreted the first statement about talking to her mother as an unequivocal assertion of her right to remain silent.

## III. THE ALASKA COURT OF APPEALS PROPERLY APPLIED THE HARMLESS ERROR STANDARD OF CHAPMAN V. CALIFORNIA IN CONCLUDING THAT THE ERROR IN THE ADMISSION OF KWALLEK'S STATEMENTS MADE AFTER THE SECOND STATEMENT ABOUT TALKING TO HER MOTHER WAS HARMLESS BEYOND A REASONABLE DOUBT

Near the end of their interview with Kwallek, Sgt. Lown and Sgt. Glass asked questions about the Kwalleks' financial situation and various unpaid bills. They asked why the bills had not been paid, and Kwallek stated there was no money to pay them. The following exchange then took place:

> Sgt. Lown: What happened to it [the money]?
>
> Kwallek: I will talk when my mom gets here, she can help.
>
> Sgt. Glass: You want to wait until your mom gets here to talk to us?
>
> Kwallek: (Inaudible both are talking) she should be

here here in just a little while. Chris is getting her now.

Sgt. Glass: Do you want to talk to us then, Patsy when she gets here?

Kwallek: Uhuh (yes). Is it be [sic] that okay?

Sgt. Glass: Sure.

Sgt. Lown: Sure, that's fine.

The Alaska court of appeals considered this to be an unambiguous invocation of the right to silent. (Slip opinion, p. 24) It ruled that the statements which Kwallek made after this point should have been suppressed. The remainder of the interview reads:

Sgt. Glass: In the mean[time] we'll just sit here and wait, and let the other two investigators go ahead and ah, maybe you can tell us where the ah, bank records ah, are. Do you have a checking account Patsy?

Kwallek: Umuh (no).

Sgt. Glass: No checking account? How do you keep track of your ah, bills?

Kwallek: Spader [Kwallek's husband] keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

Sgt. Glass: You don't have a checking account?

Kwallek: No.

Sgt. Glass: Has he ever had a checking account?

Kwallek: No.

Sgt. Glass: Ah, your, your background Patsy and your training has been in book-keeping is that correct?

Kwallek: Umuh (yes).

Sgt. Glass: Do you keep any kind of books at all? On the money spent out?

Kwallek: Umuh (no). No.

Sgt. Glass: [How] come that is?

Kwallek: I don't know I just, [when] mom gets here we'll talk about it.

Sgt. Glass: Okay. At the time is approximately 2:14 p.m. We'll go off record.

The Alaska court of appeals held that any error in admitting these few statements was harmless beyond a reasonable doubt, and thus harmless error under Chapman v. California, 386 U.S. 18 (1967). (Slip opinion, p. 24-25) Kwallek contends that the Alaska court of appeals came to the wrong conclusion -- that the admission of these few statements did prejudice her. Essentially, Kwallek is seeking review of a factual determination made by the state court. This Court should not exert its jurisdiction to review this factual finding. The issue is not one of constitutional dimensions. A decision by this Court will not change the law or provide guidance to other courts. It is simply not an issue which warrants review by

this Court. See Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952), rehrg. denied, 345 U.S. 913 (1953).

The evidence of guilt was quite strong. The murder weapon belonged to the Kwalleks. It was found in the attic of the Kwallek residence. The murderer would have had to place it there within minutes of the shooting because the police and medical personnel arrived within minutes. Ammunition for the murder weapon was found in the second bedroom. The pattern of gunshot residue found on the sleeve of Kwallek's robe was consistent with Kwallek's having fired the murder weapon.

Moreover, it is not clear from the record that the jury was even aware of the substance of Kwallek's statements made after she said she wanted to talk to her mother. The above-quoted excerpt from the June 25th interview was located on pages 42 and 43 of a 43-page typed transcript of the interview. The transcript was not read aloud for the jury. It was one of 94 exhibits introduced at trial. No tape of the interview was

played for the jury. Sgt. Lown, who testified about the substance of the interviews, made no reference to these statements. The prosecutor did not refer to the statements at any time during the trial. Even assuming the jury were aware of the statements because it read the transcript, there was nothing inculpatory about the statements. All Kwallek said was her husband did not pay his bills by check, he kept his money in his wallet, and she had some bookkeeping experience. This information was available from other sources (e.g., banks, Kwallek's previous employers, and financial records seized pursuant to the warrant).

The Alaska court of appeals correctly concluded that the error was harmless beyond a reasonable doubt.

## IV. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE DOYLE ISSUE

On appeal to the Alaska court of appeals Kwallek argued that admission of the transcript of her June 25th interview containing statements that she

wanted to talk to her mother before answering anymore questions constituted an impermissible comment on her right to remain silent under Doyle v. Ohio, 426 U.S. 610 (1976). Kwallek now requests that this Court decide the issue.

The State of Alaska submits that this Court does not have jurisdiction to consider the issue under 28 U.S.C. §1257(3). The Alaska court of appeals determined that this issue was raised for the first time on appeal. This conclusion was correct. Kwallek's motion and supporting memorandum in the trial court concentrated on whether Kwallek was in custody. Doyle was not cited in either the motion or the memorandum, and there was no hint of an argument that the latter part of the interview should be suppressed because it amounted to an impermissible comment on the right to remain silent. (Kwallek's motion to suppress and supporting memorandum are included as an appendix to the State's response.) The Alaska court of appeals properly determined that the

Doyle issue was raised for the first time on appeal.

The court of appeals did not reach the merits of the Doyle issue; rather, it concluded it did not have to rule on this issue because even if there were error, the error was not obviously prejudicial and did not require reversal. The court of appeals stated:

> Here, assuming admission of the challenged evidence constituted an error affecting Kwallek's substantial rights, we conclude that the error was not obviously prejudicial.

(Slip opinion, p. 26-27) (Emphasis supplied; citations omitted).

Since the Doyle issue was not properly preserved and since the Alaska court of appeals did not decide the merits of the issue, Kwallek cannot invoke this Court's jurisdiction under 28 U.S.C. §1257(3). This Court must refuse to consider the issue. Wilson v. Cook, 327 U.S. 474, 482 (1946).

## CONCLUSION

Kwallek's petition for writ of certiorari should be denied.

Respectfully submitted this 17th day of March, 1986.

HAROLD M. BROWN
ATTORNEY GENERAL

By: David Mannheimer
David Mannheimer
Assistant Attorney General

# APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

| | | |
|---|---|---|
| STATE OF ALASKA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| PATRICIA KWALLEK, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | No. 1KE-S82-637 Cr. |

MOTION TO SUPPRESS JUNE 25TH
STATEMENT OF DEFENDANT

COMES NOW the defendant, PATRICIA KWALLEK, by and through her attorneys, BIRCH, HORTON, BITTNER, MONROE, PESTINGER & ANDERSON, and hereby moves this court for an ORDER, suppressing the statement given by the defendant to Alaska State Troopers John Glass and Robin Lown on June 25, 1982.

This motion is made for the reason that prior to the June 25th statement, the defendant was not first apprised of her constitutional rights.

In the alternative, the defendant requests that the court suppress that portion of the statement which was given prior to the rendition of the Miranda warnings.

As a final alternative, the defendant requests that the court suppress that portion of the statement given after the defendant indicated she wanted to break off the interview.

This motion is based upon the attached MEMORANDUM IN SUPPORT as well as the accompanying exhibits.

DATED this 23rd day of September, 1982.

BIRCH, HORTON, BITTNER,
MONROE, PESTINGER
& ANDERSON

By_____
Daniel Westerburg

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

| | | |
|---|---|---|
| STATE OF ALASKA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| PATRICIA KWALLEK, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | No. 1KE-S82-637 Cr. |

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO SUPPRESS
JUNE 25TH STATEMENT OF DEFENDANT

Factual Background

On June 24, 1982, Bernard "Spade" Kwallek was shot and killed in the front yard of his residence on North Tongass Boulevard in Ketchikan. His wife, Patsy Kwallek, was informally interviewed several times at the scene and a formal, tape recorded, interview was conducted later that day. Mrs. Kwallek's knowledge of the shooting was limited and she denied any involvement. By late that evening, however, Mrs. Kwallek had become the State's prime suspect in the case. (See comments of Sgt.

John Glass to witness James Jenck in Mr. Jenck's June 24th statement. Exhibit "A".)

On the afternoon of June 25, 1982, Sgt. Morris Rogers of the Alaska State Troopers picked up Mrs. Kwallek from the Jenck residence where she had been staying and drove her back to the Kwallek residence for an interview with Sgt. Glass and Sgt. Robin Lown of AST.

A transcript of the interview was prepared and a copy was provided to the defendant who, for the purposes of this motion, is willing to assume its general accuracy. (Exhibit "B") It appears that the interview was conducted in the Kwallek residence with Mrs. Kwallek, Sgt. Lown and Sgt. Glass the only persons present.

Mrs. Kwallek was not advised of her constitutional rights before the questioning began.

The interview commenced with Sgt. Glass informing Mrs. Kwallek that she was not under arrest. Sgt. Glass then advised Mrs. Kwallek that he believed that in her previous statements she had not been telling the "true story" of what had happened on the morning of the shooting. (Exhibit "B," page 1) Mrs. Kwallek responded: "I'll try to help any way I can" and then proceed

[sic] to explain what transpired on the morning of June 24th. Her response to Sgt. Glass' and Sgt. Lown's questions were [sic] consistent with those in her June 24th statement (Exhibit "C") as well as her informal statements taken at the scene shortly after the shooting.

Approximately 8 minutes after the interview began, Sgt. Lown temporarily discontinued questioning in order to advise Mrs. Kwallek of her constitutional rights. Mrs. Kwallek indicated that she understood her rights and agreed to continue to talk with the Troopers. (Exhibit "B," page 6). The interview then re-commenced.

After several more minutes of questioning, Sgt. Glass served Mrs. Kwallek with search warrants for her bathrobe, a sample of attic insulation and bank and bookkeeping records at the residence. Sgt. Glass then apparently brought in several investigators from Anchorage to conduct the search.

At this time, Mrs. Kwallek stated: "I think I should wait and talk with my Mom gets here [sic] before I say what to do." (Exhibit "B," page 14)

Ignoring Mrs. Kwallek's remark, Sgt. Lown and Sgt. Glass then continued to

question Mrs. Kwallek in a much more aggressive fashion. (Exhibit "B," pages 14-17) Mrs. Kwallek then repeated: "I will talk when my Mom gets here, she can help." (Exhibit "B," page 17)

Again ignoring Mrs. Kwallek's remark, Sgt. Glass continued to question Mrs. Kwallek until she stated for the third time: "I don't know, I just, Mom gets here we'll talk about it." (Exhibit "B," page 18)

Shortly thereafter, Mrs. Kwallek was taken to the Ketchikan Detachment of AST where she was formally arrested by Sgt. Glass on suspicion of the First Degree Murder of Bernard Kwallek.

## ARGUMENT

### I

### THE INTERVIEW OF MRS. KWALLEK WAS CONDUCTED IN A CUSTODIAL SETTING; ACCORDINGLY, MRS. KWALLEK WAS ENTITLED TO RECEIVE MIRANDA WARNINGS PRIOR TO QUESTIONING

Under the U.S. Supreme Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966), a person who has been "taken into custody or

otherwise deprived of his freedom of action in any significant way" is entitled to be advised of his constitutional rights prior to questioning. The failure of police officers to properly advise a suspect of his rights, results in the suppression of any statements or other evidence gained thereby. Furthermore, police cannot "fix" a non-existent or inadequate Miranda warning by an "after the fact" warning. Westover v. United States, 384 U.S. 436 (1966).

In Hunter v. State, 590 P.2d 888 (Alaska 1979), the Alaska Supreme Court adopted the "objective, reasonable person" test to determine the existence of a custodial setting triggering the Miranda requirement. Under the test, there must be some actual indication of custody, such that a reasonable person would feel he was not free to leave and break off police questioning. The court established three (3) general factors to be considered in determining the existence of a custodial setting:

1. Facts intrinsic to the interrogation: when and where the interrogation occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant

or things equivalent to actual physical restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or a witness.

2. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning -- whether he came completely on his own, in response to a police request, or escorted by police officers.

3. It is also important what happened after the interrogation -- whether the defendant left freely or was detained or arrested.

By applying the above 3 factors to the present case, it is clear that Mrs. Kwallek was in a custodial setting during the June 25th interview.

1. Setting.

While the interview admittedly took place in Mrs. Kwallek's residence, it must be remembered that it was conducted by 2 police officers and that none of Mrs. Kwallek's family or friends were present. It must also be remembered that sometime during the midst of the interview, apparently several other investigators

were in the residence conducting a search pursuant to several search warrants.

There can be little doubt from the tenor of the questioning, that Mrs. Kwallek was being questioned not as a witness but as the State's prime suspect in the case. This fact is confirmed by Sgt. Glass' statement to James Jenck on the evening before the interview that Mrs. Kwallek was supected of shooting her husband. [Exhibit "A"]

2. Pre-Interview Facts.

Mrs. Kwallek was escorted to the residence by Sgt. Morris Rogers who was presumably in uniform and using a marked Troopers vehicle. Mrs. Kwallek obviously came to the interview in response to a police request.

3. Post-Interview Facts.

Mrs. Kwallek was taken to Trooper Headquarters at the conclusion of the interview where she was formally arrested by Sgt. Glass. It is important to note that Mrs. Kwallek did not disclose any "new" material or information at the second interview. Thus, the Troopers arrested Mrs. Kwallek based upon the circumstantial evidence they had already obtained before the interview took place. Accordingly, it is highly likely that the only reason Mrs. Kwallek was not

arrested prior to the interview was so that the Troopers could attempt one last "non-Miranda" interview prior to her formal arrest.

A similar situation occurred in State v. Cassell, 602 P.2d 410 (Alaska 1979) where a police office delayed serving a suspect with an arrest warrant until after questioning. The officer stated that the reason for this was to obtain a statement from the suspect. The court took this factor into consideration in determining that Cassell was in de facto custody and was entitled to Miranda warnings prior to questioning. (See also In the Matter of J.M.A., 542 P.2d 170 (Alaska 1975).)

Under the criteria established in Hunter v. State, it is fairly clear that Mrs. Kwallek was in a custodial setting at the time of the June 25th interview. The failure of the State to advise Mrs. Kwallek of her constitutional rights at the outset of the interview should result in a suppression of the statement, together with any fruits thereof.

II

## THE LATE MIRANDA WARNING GIVEN BY SGT. LOWN CANNOT "FIX" A TAINTED INTERVIEW

As mentioned in the Statement of Facts, approximately during the middle of the interview, Mrs. Kwallek was formally advised of her Miranda rights. However, an untimely Miranda warning cannot "fix" the tainted interview. Under the "cat-out-of-the-bag" principle first enunciated in Westover v. United States, 384 U.S. 436 (1966), if a suspect has not been given a proper Miranda warning at the outset of a custodial interrogation, the fact that a proper warning is given at some later time cannot rectify the situation. The entire interview is "tainted" by the Miranda violation and none of the statement is admissible. For this reason, the entire interview of Mrs. Kwallek must be suppressed, despite the fact that a Miranda warning was given during the midst of the interrogation.

## CONCLUSION

Mrs. Kwallek was clearly in a custodial setting at the time of the June 25, 1982 interview. There is absolutely no excuse for the

failure of Sgt. Lown and Sgt. Glass, both experienced Troopers, to advise Mrs. Kwallek of her constitutional rights prior to the interview. There can be no doubt that a formal arrest was intended and that if Mrs. Kwallek had attempted to leave the area she would have been placed under physical restraint.

For all these reasons, the defendant respectfully requests that her MOTION TO SUPPRESS be granted.

DATED this 23rd day of September, 1982.

RIRCH, HORTON, BITTNER,
MONROE, PESTINGER
& ANDERSON

By_____
Daniel Westerburg